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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1938

No. 294

CITY OF TEXARKANA, TEXAS, PETITIONER,

vs.

ARKANSAS LOUISIANA GAS COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 22, 1938.

CERTIORARI GRANTED OCTOBER 10, 1938.

SUPREME COURT OF THE UNITED STATES

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INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOVEMBER 18, 1938.

[fol. a] [Captions omitted]

[fols. 1-2]

IN DISTRICT COURT OF BOWIE COUNTY, TEXAS, FIFTH JUDICIAL DISTRICT

OCTOBER TERM, A. D. 1933

No. 19522

PLAINTIFF'S ORIGINAL PETITION—Filed November 16, 1933

To the Honorable Judge of said Court:

Now comes the City of Texarkana, Texas, a municipal corporation, chartered and incorporated under and by virtue of the laws of the State of Texas, situated in the County and [fol. 3] State aforesaid, hereinafter called plaintiff, complaining of the Southern Cities Distributing Company, a corporation duly incorporated and doing business in the City of Texarkana, Bowie County, Texas, and owning and operating a natural gas distributing plant through a system of pipes over and under the streets and alleys of the City of Texarkana, Texas, and selling natural gas to the inhabitants of said City for household and commercial purposes, hereinafter styled defendant, and for cause of action plaintiff represents to the Court:

I

That heretofore, to-wit, on the 13th day of June, A. D., 1930, plaintiff, being then duly chartered under an Act of the Legislature and acting under said Charter through its constituted officers, duly elected qualified and empowered to act, did, on the 13th day of June, A. D., 1930, by virtue of said authority granted and exercised, passed an ordinance in writing in the form of a franchise to and with the Southern Cities Distributing Company, granting certain rights and privileges to said Company and granting and establishing certain increased rates to be charged by the defendant to the plaintiff and the resident citizens and gas consumers of the said City of Texarkana, Texas, for gas distributed by it, and sold to said consumers. A copy of said franchise and ordinance is attached to this petition, marked Exhibit "A", and made a part hereof for all purposes as if copied herein.

[fol. 4] II

That the ordinance for said franchise provides, in part, that, "This ordinance shall become effective and be binding upon the Grantee and the City of Texarkana, Texas, upon the grantee filing with the Clerk of the City of Texarkana, Texas, its written acceptance of the terms of this ordinance within sixty days from and after the passage hereof." That thereafter on the 17th day of June, A. D. 1930, the defendant, Southern Cities Distributing Company, accepted the terms and conditions set forth in said franchise, or ordinance, by filing with said City Secretary a written acceptance, as follows:

"Southern Cities Distributing Company,

Shreveport, Louisiana

June 17, 1930.

"The Hon. Mayor and City Council of Texarkana, Texas:

"The Southern Cities Distributing Company does hereby accept the Ordinance, with its terms and provisions, finally adopted by the City Council of Texarkana, Texas, on the 13th day of June, 1930.

"In testimony thereof, witness the signature and seal of said Southern Cities Distributing Company on this, the 17th day of June, A. D., 1930.

"Southern Cities Distributing Co., (Signed) D. W. Harris, Vice-President." (Seal.)

"Filed June 18, 1930 at 11:37 A. M. Ordinance Book 4, page #48. R. E. Floyd, Secretary."

[fol. 5] III

The plaintiff alleges that by reason of such acceptance of the franchise heretofore plead, said defendant became bound to the said City of Texarkana, Texas, and to the Citizens thereof to carry out the terms of said franchise and ordinance and to supply gas under the rates granted and established therein. Said portion of said franchise granting such rates is contained in Section V of said ordinance.

IV

Plaintiff specially pleads Section VIII-A of said franchise and ordinance agreement, which is as follows: "In con-

sideration of the granting of this franchise, it is mutually agreed and understood by and between the parties hereto that before the City Council of said City shall apply for a reduction in rates, or before the Southern Cities Distributing Company, its successors or assigns, shall make application for an increase in rates, either party shall give to the other party one year's notice in writing of its intention to so apply for an increase or decrease in rates, and no application for increase or decrease in rates shall be acted upon or considered unless said one year's notice is first given before making such application." Plaintiff would further show to the Court that said franchise is in all things in force, and that the same has not been amended, modified or repealed, nor has any attempt been made to amend, repeal or modify [fol. 6] said franchise in any manner whatsoever; all of which facts are well-known to the defendant.

V

Plaintiff would show to the Court that the defendant, Southern Cities Distributing Company, notwithstanding the terms and conditions of the franchise above pleaded and the acceptance thereof and the fact that it has been operating thereunder and collecting the rates therein granted, the said Southern Cities Distributing Company did, on the 3rd day of November, 1933, file with the City Secretary of the City of Texarkana, Texas, an instrument in writing styled "Notice and Application of Southern Cities Distributing Company, for Change and Modification of rates to Go into Immediate Effect." A copy of said application is hereto attached, marked Exhibit "B," and made a part hereof. That notwithstanding Section VIII-A of said franchise and agreement the Southern Cities Distributing Company in its said application states as follows: "Therefore, applicant gives notice to the City Council of Texarkana, Texas, and to the Public, that on November 23rd, 1933, a new schedule of rates and charges for furnishing gas will be placed into effect in Texarkana, Texas, as follows:" (Here follows the Schedule of increased rates, set forth in Exhibit "B" to this petition, said Exhibit "B," being here referred to for details as to such proposed increased rates.)

[fol. 7] VI

Plaintiff would further show to the Court that thereafter on the 4th day of November, 1933, the defendant filed with

the City Secretary of the City of Texarkana, Texas, an instrument in writing as follows:

"Texarkana, Texas,
November 2nd, 1933.

"To the Honorable Mayor and Members of the City Council of the City of Texarkana, Texas:

"You are hereby notified pursuant to the terms of a certain franchise, dated June 13, 1930, that the grantee therein, Southern Cities Distributing Company, will apply for an increase in rates one year after date of giving this notice.

"This notice contemplated an application for an increase in rates over such rates as have been applied for pursuant to the application of said grantee, Southern Cities Distributing Company, now pending, for an immediate increase in rates upon which Southern Cities Distributing Company is requesting and will seek prompt hearing and action.

"Southern Cities Distributing Company, By Paul F. McBride, General Manager."

"G. D. Garrett, City Secretary, Nov. 4, 1933."

VII

Plaintiff further alleges that the defendant is threatening and attempting to raise the rates of gas to the citizens and [fol. 8] gas consumers of Texarkana, Texas, in violation of said ordinance and in violation of the law and to collect from the consumers of gas in said City at a greater rate than that provided for in said franchise and ordinance; and that said rates so threatened and attempted to be put in force are in conflict with said franchise and ordinance and, if placed in effect, will work irreparable injury upon the citizens and gas consumers of Texarkana, Texas.

VIII

Plaintiff further says that it has no adequate remedy at law, and that unless restrained the Southern Cities Distributing Company will put into effect without authority of law rate far in excess of that provided for in said franchise and ordinance, and in excess of the rates which were agreed

to by the defendant in the acceptance of said franchise and ordinance.

IX

Plaintiff further says that if said rates should be put into effect, or if defendant be permitted to charge and collect the amount set forth in said Exhibit "B," it would work irreparable injury upon the citizens and gas consumers of Texarkana, Texas, in the sum of the excess of the rate attempted to be charged and collected over and above that provided for in said franchise and ordinance.

Wherefore, premises considered plaintiff prays the Court to grant its most gracious writ of injunction restraining the [fol. 9] defendant from puting into effect on the 23rd day of November, 1933, or at any other time or in any other manner except at the time and in the manner provided in said franchise and ordinance and after pursuing the remedies provided by law, the schedule of rates set out in said Exhibit "B," or from in any way attempting to put into effect any rate or schedule not in conformity with the terms and conditions of said franchise and ordinance, made a part of this petition. If, for any reason, your plaintiff is not entitled to an injunction to secure specific performance of said franchise agreement, as herein plead and prayed for, then plaintiff further pleads that the expressed intention of the defendant to put the proposed new rates into effect on November 23, 1933, will be, if carried out, in open disregard of the statutes of Texas providing a machinery for securing an increase in rates and plaintiff is entitled to such injunction to prevent the defendant from increasing its rates in any manner other than that provided by law. Plaintiff further prays for costs of suit and general relief.

Ed B. Levee, Jr., Attorney for Plaintiff. E. Newt Spivey, J. Fred Hoffman, Of Counsel.

Duly sworn to by Ed B. Levee, Jr. Jurat omitted in printing.

[fol. 10] EXHIBIT "A" TO PETITION

An Ordinance providing for a supply of gas service to and for the City of Texarkana, Texas, and its inhabitants and other consumers therein, to be furnished and supplied by Southern Cities Distributing Company, its successors and assigns, providing the rates to be charged for such service and the terms and conditions upon which such service is to be furnished and empowering said company to maintain and operate gas plants and distribution systems within the City of Texarkana, Texas, and the vicinities adjacent thereto.

Be it ordained by the City Council of the City of Texarkana, Texas, as follows:

Section I. That there is hereby granted to and vested in Southern Cities Distributing Company, a corporation, its successors and assigns (hereinafter referred to as the "Grantee"), for a period of twenty-five (25) years from the [fol. 11] date of the passage of this Ordinance, the right and francise, power, privilege and authority to furnish, supply and serve to and within the City of Texarkana, Texas, and the vicinities adjacent thereto and to its inhabitants and other consumers therein, natural and/or manufactured and/or mixed gas; the right to construct, maintain and operate in the City of Texarkana, Texas, a plant or plants and a distribution system for the manufacture, production, purchase, sale and distribution of manufactured and/or natural and/or mixed gas; the right, franchise and privilege of using, and the right-of-way in, through, under, upon and over the present and future streets, avenues, lanes, alleys, sidewalks, bridges and approaches thereto, public highways and other public places within the City limits of the City of Texarkana, Texas, as now or hereafter fixed for the purpose of laying, installing, constructing, maintaining, operating, repairing, replacing, reclaiming, removing, and the right and privilege so to do, of all pipes, services, conduits, mains and all other material, equipment, appliances, attachments and apparatus necessary, expedient, convenient, incident or useful to the acquisition, receipt, purchase, manufacture, production, retention, sale, transportation, conveyance and distribution of natural and/or manufactured and/or mixed gas and the furnishing and supplying thereof, and the sale of gas service to the City of Texar-

kana, Texas, and inhabitants thereof and other consumers [fol. 12] therein, and the distribution of such gas to the vicinities adjacent to the said City.

Section II. The Grantee shall, with all reasonable diligence, replace all public places disturbed by it in as good condition as they were prior to the excavation thereof, and it shall at all times indemnify and save the City of Texarkana, Texas, harmless from any and all damages which the said City may suffer or be made or become liable for by reason of the laying, installing, constructing, maintaining, repairing, replacing, extending, continuing and operating said pipes, mains, services and attachments. The Grantee shall furnish to the City a properly executed and approved surety bond in the sum of one thousand ($1,000.00) dollars for the purpose of protecting and indemnifying the City against the expense of making repairs to streets, alleys, sidewalks and pavements disturbed by Grantee's operations.

Section III. The Grantee shall, at its own expense lay and maintain all service pipes from its mains in the streets to the established curb lines of said streets. All pipes, connections and appliances from the end of the said service line shall be installed and maintained by the consumer at his sole risk and expense. All consumers shall be solely responsible for proper installation and maintenance in safe condition of all pipes, connections and appliances from the point where the consumers' pipes connect with the Grantee's service pipes. Grantee shall install and maintain suitable meters as its own expense.

[fol. 13] Section IV. The Grantee agrees to furnish gas service as herein provided, subject to interruptions caused by acts of God, the elements, strikes, lockouts, or other industrial disturbances, acts of the public enemy, wars, insurrections riots, epidemics, land slides, lightning, earthquakes, fires, storms, floods, washouts, civil disturbances, explosions, breakage or accident to machinery and freezing of lines or pipes or appliances, and in the event of the happening of any or either of said contingencies, applicant agrees to restore service immediately, and as soon as it can possibly be done.

Section V. A hearing as to the rates which shall be charged by the Grantee having been had, and the Grantee having waived any right to notice of the fixing of such rates,

the rates to be charged by the Grantee for natural gas furnished under the provisions of this ordinance are hereby determined and fixed by compromise agreement, said rates are as follows, to-wit:

Domestic and Commercial Rate

(a) For the first one thousand (1000) cubic feet per meter of gas or fraction thereof sold to any domestic or commercial consumer during any one month—$1.00 per thousand cubic feet. Said charge shall also be made regardless of whether any gas is consumed or not.

(b) For the next one hundred and forty-nine thousand (149,000) cubic feet of gas or fraction thereof sold to any [fol. 14] domestic or commercial consumer during any one calendar month —$.50 per thousand cubic feet. All gas sold at $.50 per thousand cubic feet is subject to 5% discount if paid within ten (10) days after bill is rendered.

(c) For all gas sold to any one domestic or commercial consumer during any one calendar month in excess of one hundred and fifty thousand (150,000) cubic feet—$.25 per thousand cubic feet. All gas sold at $.25 per thousand cubic feet is subject to $.02 per thousand cubic feet discount if paid within ten days after bill is rendered.

A charge of $1.00 shall be made for each connect or disconnect, after first installation, that is made for the same consumer, at the same address, except where meter is removed to be replaced, repaired or for inspection.

Churches, schools or colleges maintained by State, County or City; schools or colleges maintained by any religious organizations; public hospital shall be allowed a gross discount of 40% from the gross rate for domestic and commercial gas when bills are paid within ten days after being rendered. Municipal buildings shall be allowed free gas for all gas used in conducting the City's business.

[fol. 15] Industrial Rate

All industrial consumers shall be served by contract, the rates for the first three million, five hundred thousand (3,500,000) cubic feet shall be as follows:

(a) First 500 M cubic feet or fraction thereof sold in any one calendar month to one industrial consumer—$.21 per M cubic feet.

(b) Next 1,000 M cubic feet or fraction thereof sold in any one calendar month to one industrial consumer—$.20 per M cubic feet.

(c) Next 1,000 M cubic feet or fraction thereof sold in any one calendar month to one industrial consumer—$.19 per M cubic feet.

(d) Next 1,000 M cubic feet or fraction thereof sold in any one calendar month to one industrial consumer—$.18 per M cubic feet.

Each industrial consumer using over 3,500 M cubic feet per month shall be subject to be served under a special contract executed between the Grantee and the consumer at rates to be mutually agreed on by them provided, however, that in no case shall there be any discrimination in rates between industrial consumers so served while they are engaged in the same character of business and using substantially the same quantities of gas under substantially the same load factors, and a copy of such private contracts shall be subject to inspection of the Mayor or any member of the City Council at any time.

[fol. 16] A minimum charge of $35.00 per month per consumer shall be collected from those consumers to whom the industrial rates apply.

A penalty of 5% shall be added if bills are not paid within ten days after said bills are rendered.

Section VI. The grantee shall have the right to require its consumers to deposit with it such sums of money as it may consider reasonably necessary to insure the prompt payment of its rates and charges. In no case shall the deposit be greater per consumer than twice the average monthly bill and in no event less than five ($5.00) dollars per consumer, and any consumer feeling himself aggrieved by reason of the terms of this Section after a failure to agree with the Grantee herein, may appeal to the City Council for relief.

Section VII. The Grantee shall have the right to shut off gas from any consumer at any time for any of the following reasons:

For repairs, for non-payment of bills when due, for fraudulent representation in relation to the consumption of gas, for failure to make deposits when required, for

tampering or permitting the tampering with the meters or service pipes through which gas is served, for placing or permitting the placing of any substance as an obstruction in any meter or service pipe, for permitting service pipes, connections or appliances of the consumers to leak or other- [fol. 17] wise permit the escape or waste of gas. The Grantee shall have full right and authority to make and establish, from time to time, rules and regulations with reference to gas service within said City, subject to approval of City Council and prescribe the forms of applications and contracts to be signed by its customers and the Council upon consideration thereof, and if approved by it, will pass the necessary ordinances to properly enforce such rules and regulations.

Section VIII. All rights and privileges hereby granted, and all duties hereby imposed upon the Grantee shall extend to and be binding upon its successors and assigns. This Ordinance shall not impair or affect any other rights and privileges which the Grantee has heretofore acquired.

This franchise is for the sole use and benefit of the Southern Cities Distributing Company, and is not assignable or transferably to any other person, firm of corporation, without the consent of the City Council given in like manner as the granting of this franchise, and any transfer, or attempt to transfer this franchise without the consent of the City Council as herein provided shall ipso facto forfeit this franchise.

Section VIII-A. In consideration of the granting of this franchise, it is mutually agreed and understood by and between the parties hereto that before the City Council of said City shall apply for a reduction in rates, or before the Southern Cities Distributing Company, its successors or [fol. 18] assigns, shall make application for an increase in rates, either party shall give to the other party one year's notice in writing of its intention to so apply for an increase or decrease in rates, and no application for increase or decrease in rates shall be acted upon or considered unless said one year's notice is first given before making such application.

Section IX. If Grantee shall be finally compelled to, or should voluntarily, place in any rates in the City of Tex-

arkana, Arkansas, less than the rates granted by this Ordinance then and thereupon the lessened rate shall apply in the City of Texarkana, Texas, and Grantee shall not be authorized or permitted to charge and collect any higher rate.

Section X. This Ordinance shall become effective and be binding upon the Grantee and the City of Texarkana, Texas, upon the Grantee filing with the Clerk of the City of Texarkana, Texas, its written acceptance of the terms of this Ordinance within sixty (60) days from and after the date of the passage hereof.

Passed and approved, this 13th day of June, 1930.

(Signed) L. S. Kennedy, Mayor.

Attest: (Signed) R. E. Floyd, City Secretary. (Seal, City of Texarkana, Texas.)

[fol. 19] Copy

Southern Cities Distributing Company,

Shreveport, Louisiana

June 17, 1930.

The Hon. Mayor and City Council of Texarkana, Texas:

The Southern Cities Distributing Company does hereby accept the Ordinance, with its terms and provisions, finally adopted by the City Council of Texarkana, Texas, on the 13th day of June, 1930.

In testimony thereof, witness the signature and seal of said Southern Cities Distributing Company on this, the 17th day of June, A. D., 1930.

Southern Cities Distributing Co., (Signed) D. W. Harris, Vice President. (Seal, Southern Cities Distributing Company.) (Seal, City of Texarkana, Texas.)

Filed June 18th, 1930, 11:37 a. m. Ordinance Book 4, page 48. R. E. Floyd, Secretary.

EXHIBIT "B" TO PETITION

To the Honorable City Council of Texarkana, Texas, and to the Public:

Notice and application of Southern Cities Distributing Company, for change and for modification of rates and application for new rates to go into immediate effect.

Owing to the fact that gas is now and has been distributed and sold by application to consumers in the City of Tex-
[fol. 20] arkana, Texas, at rates which have failed and will in the future fail to yield sufficient revenue to pay operating expenses and are and will be insufficient to provide in addition to operating expenses, for depreciation or return on investment, or both, it is necessary that the rates be changed and modified.

Applicant states that the rates heretofore charged have been and are now confiscatory of its property; and that the rates heretofore charged will not at any time in the future yield any return upon its investment in said city.

Therefore, applicant gives notice to the City Council of Texarkana, Texas, and to the Public that on November 23rd, 1933, a new schedule of rates and charges for furnishing gas will be placed into effect in Texarkana, Texas, as follows, to-wit:

Domestic and Commercial Rates

For the first 1,000 cubic feet or fraction thereof sold in any one thirty day period to any domestic or commercial consumer $1.75.

For the next 2,000 cubic feet sold in any one thirty day period to any domestic or commercial consumer .$75 per thousand cubic feet.

For the next 7,000 cubic feet sold in any one thirty day period to any domestic or commercial consumer $.55 per thousand cubic feet.

For all gas over 10,000 cubic feet sold in any one thirty day period to any domestic or commercial consumer $.35 per thousand cubic feet.

[fol. 21] A minimum charge of $1.75 for each thirty day period shall be made to each domestic and commercial consumer connected to the distributing system.

An additional ten per cent over the above rates shall be charged each domestic and commercial consumer who fails to pay his bill within ten days after said bill is rendered.

Schools or colleges maintained by State, county or City; schools or colleges maintained by any religious organization; churches, public hospitals and municipal buildings shall be allowed a discount of 25% from the above rates for domestic and commercial gas when bills are paid within ten days after being rendered.

Central Heating Rates

Domestic and Commercial consumers with central heating installations shall be served under the regular domestic and commercial rates for the first 200,000 cubic feet consumed in any one calendar month; Consumption in excess of 200,000 cubic feet in any one calendar month shall be subject to be sold under special contract executed between the company and the consumer at rates to be mutually agreed upon, provided, however, that in no case shall there be any discrimination in rates between consumers so served while they are engaged in the same character of business and use sub-tantially the same quantities of gas under approximately the same load factors.

An additional ten per cent over the above rates shall be charged each domestic and commercial consumer who fails [fol. 22] to pay his bill within ten days after said bill is rendered.

Industrial Rates

Each industrial consumer shall be subject to be served under special contract executed between the company and the consumer at rates to be mutually agreed upon, provided, however, that in no case shall there be any discrimination in rates between consumers so served while they are engaged in the same character of business and use substantially the same quantities of gas under approximately the same load factors.

A minimum charge of $25.00 per consumer per month shall be collected from those consumers to whom the industrial rates apply.

An additional five per cent over the above rates shall be charged each industrial consumer who fails to pay his bill within ten days after said bill is rendered.

Losses on Rates in Force Since June, 1930

Applicant states that its distributing plant in the City of Texarkana, Texas has a fair value in excess of $515,-

000.00; that its operations for the year ending December 31, 1932, after including reasonable depreciation upon the value of its physical property, resulted in a net loss in excess of $85,000.00; that it is entitled to a minimum of eight per cent interest upon the fair value of its property plus Federal income taxes upon same; that the addition of these items increase its loss during this period to an amount in ex- [fol. 23] cess of $130,000.00; that applicant is, therefore, under the necessity of increasing its gross revenue by $130,-000.00 to enable it to realize its expenses, depreciation, interest on investment and Federal income taxes on same.

Applicant further states that it is now and has been suffering an annual loss, as enumerated above in excess of $130,000.00, and that it is now and has been suffering a daily loss in excess of $350.00.

Applicant further states that the above computations include gross revenue on the basis of rates in effect since June 24th, 1930.

Applicant further states that the new schedule herein contained will yield a gross revenue of approximately $309,-000.00, estimated upon the basis of gas consumption the same as that actually experienced for the year 1932, and that such consumption cannot be reasonably expected to increase so as to yield petitioner under the said schedule more than an adequate or reasonable return upon its investment in the City of Texarkana, Texas, and applicant is prepared to present evidence to this effect.

Applicant states that it buys all of the gas it distributes in Texarkana, Texas from the Arkansas Louisiana Pipeline Company at the town border; that it pays a reasonable price for said gas; that the Arkansas Louisiana Pipeline Company is the owner and operator of a gas pipeline transmission system; that said system is interstate and not intrastate.

The relation between applicant and Arkansas Louisiana Pipeline Company is that the common stock of both is [fol. 24] owned by Arkansas Natural Gas Corporation with the exception of a few shares.

The Arkansas Louisiana Pipeline Company, although economically and efficiently managed, has not been able to earn a reasonable return upon the fair value of its investment, used and useful, in producing, transporting, buying and selling gas; if it should be compelled to sell gas to

applicant at less than the present price, its property would be confiscated without due process of law and it would be denied equal protection of the laws in violation of the Fourteenth Amendment of the constitution of the United States.

The fair value of the pipeline system based on prices prevailing January 1, 1932, is $36,616,007.84. The prices on January 1, 1932 were lower than they had been for several years prior thereto and were lower than prices are now or which may be expected. Said Arkansas Louisiana Pipeline Company is now entitled to use a large valuation as the fair value of its property upon which to base returns owing to the recent rise in costs.

The revenues and expenses of the pipeline system for the twelve months period ending June 30th, 1932 were as follows:

Gross Earnings	$5,957,804.16
Total Expense—Including depreciation on physical property at a rate of 5% per annum	4,878,034.16
Net amount available for Federal taxes and interest and profit on investment	$1,079,770.00

[fol. 25] From this should be deducted Federal taxes at 13¾%, amounting to $148,468.38, leaving an amount of $931,301.62 for interest and profit on its investment, the present value of which is not less than $36,616,007.84; that is a return of only 2.54% on the fair value of its investment as of January 1, 1932, and a less return on the present fair value thereof. For several years past, the pipeline system has failed to earn a reasonable return on its investment, and will for several years in the future fail to earn the return to which it is entitled.

Applicant further states that unless the new schedule of rates is placed into effect immediately, its investment will be seriously impaired and daily loss will continue.

Daily Confiscation

Applicant further states that it is suffering a loss of $350.00 per day and that it is daily failing to receive sufficient revenue in the operation of its plant in the City of Texarkana, Texas, to pay operating expenses; that such losses amount to confiscation of its property. On account

of such daily confiscation, applicant prays for immediate authority to place into effect and collect the rates specified in the new schedule of rates hereinabove set forth, pending hearing; and your applicant prays that it be allowed to introduce its evidence at once, in order that the rates herein applied for may be temporarily placed into effect immediately; and that final hearing be had and completed promptly [fol. 26] and that its application be finally approved as of the date on which the new rates were temporarily placed into effect.

Applicant offers to give good and sufficient bond, for such reasonable amount and on such reasonable terms as the Council may prescribe, to refund any charges over what may be finally fixed by the City Council of Texarkana, Texas; provided that, if recourse is had by applicant to the Texas Railroad Commission or to Court, then the refund, if any, to be such only as may be adjudged by the Court.

Wherefore, premises considered, your applicant prays that said new schedule of rates and charges in the City of Texarkana, Texas, be temporarily placed into effect at once upon reasonable bond pending final hearing, and that upon final hearing the said schedule of rates be finally approved and established by the City Council.

Respectfully submitted, Southern Cities Distributing Company, by Paul F. McBride, General Manager. (Seal of City.)

Filed 11/3/33. G. D. Garrett, City Secty., by Helen Bounds, Deputy.

[File endorsement omitted.]

[fol. 27] In District Court of Bowie County

Order that Clerk Issue Writ of Injunction—November 16, 1933

The foregoing petition for injunction being considered, it is ordered that the Clerk of the District Court of Bowie County, Texas, issue a writ of injunction in all things as prayed for in the within petition.

R. H. Harvey, Judge of District Court, Bowie County, Texas.

[File endorsement omitted.]

IN DISTRICT COURT OF BOWIE COUNTY

WRIT OF INJUNCTION—Issued November 16th, 1933, Filed November 23rd, 1933

The State of Texas, To Southern Cities Distributing Company, a Corporation, Greeting:

Whereas, The City of Texarkana, Texas, a municipal corporation filed its petition in the District Court of Bowie [fol. 28] County, Texas, 5th Judicial Dist., on the 16th day of November, A. D. 1933, in a suit numbered 19522 on the Docket of said Court, wherein The City of Texarkana, Texas, a municipal corporation is Plaintiff vs. Southern Cities Distributing Company, a corporation is defendant alleging

(Here follows copy of Plaintiff's Original Petition as above.)

And whereas, the Hon. R. H. Harvey, Judge of said Court, has made upon said petition his fiat as follows:

THE STATE OF TEXAS,
County of Bowie:

In Session, this 16th day of November, A. D. 1933

The foregoing petition for injunction being considered, it is ordered that the Clerk of the District Court of Bowie County, Texas, issue a writ of injunction in all things as prayed for in the within petition.

R. H. Harvey, Judge of District Court, Bowie County, Texas.

And whereas the said —— —— has executed and filed with the Clerk of said Court a bond in the sum of — Dollars, made payable and conditioned as required by law and the fiat of the judge.

You are hereby commanded to desist and refrain from putting into effect on the 23rd day of November, 1933, or at any other time, or in any other manner except at the [fol. 29] time and in the manner provided in said franchise and ordinance and after pursuing the remedies provided by law and the schedule of rates set out in said Exhibit "B" of plaintiff's Original Petition, or from in any way

attempting to put into effect any rate or schedule not in conformity with the terms and conditions of said franchise and ordinance plead in the Plaintiff's Original Petition until the further order of said District Court, to be holden within and for the County of Bowie, at the Court House thereof, in Boston, Texas Instanter, when and where this Writ is returnable.

Witness, D. B. Simmons, Clerk, District Court, Bowie County.

Given under my hand and the seal of said Court, at office, in Boston, Texas, this 16th day of November, A. D. 1933.

D. B. Simmons, Clerk, District Court, Bowie County, Texas.

Sheriff's Return

Came to hand on the 17 day of November, A. D. 1933, at 4 o'clock P. M., and executed on the 18 day of November, A. D. 1933, at 10 o'clock A. M., by delivering to the within named Southern Cities Distributing Company, a corporation, a true copy of this Writ, at Texarkana, Texas, by de-
[fol. 30] livering a true copy of this writ to Paul E. Clay, Manager of Southern Cities Distributing Company.

G. H. Brooks, Sheriff, Bowie County, Texas, by Harry Monsarrat, Deputy.

[File endorsement omitted.]

Citation Issued November 16, 1933, Served November 18, 1933

Do not copy Citation, state: "Citation issued November 16, 1933, served November 18, 1933, and filed November 23, 1933."

Notice of Petition and Bond for Removal to Federal Court

Do not copy Notice, state: "Notice of Petition and Bond for Removal to the Federal Court dated November 21, 1933, was acknowledged by Plaintiff November 22, 1933."

[fol. 31] In District Court of Bowie County, Texas, Fifth Judicial District

No. 19522

The City of Texarkana, Texas, Plaintiff,

vs.

Southern Cities Distributing Company, Defendant

Petition for Removal—Filed November 22nd, 1933

To the Honorable Judge of said Court:

Now comes the defendant herein, Southern Cities Distributing Company, as petitioner in the above entitled cause and respectfully shows to this Court:

1

That the above numbered and entitled suit has been brought in this Court and is now pending herein.

2

That said action is of a civil nature, instituted by the City of Texarkana, Texas as a municipal corporation by a bill for injunction to restrain the defendant, Southern Cities Distributing Company, a public utility furnishing said City and the residents thereof with natural gas for fuel purposes, from raising the price of rates at which it will furnish gas to said City and its residents, all as more fully shown and set forth in plaintiff's petition and prayer for injunction filed herein on the 16th day of November, A. D., 1933, and to which reference is made for particulars.

[fol. 32]

3

That the value of the matter in controversy in said action exceeds three thousand dollars ($3,000.00), exclusive of interest and costs, as shown by the allegation contained in the plaintiff's petition and prayer for injunction through Exhibit B attached thereto and made a part thereof, wherein it appears that defendant has been suffering a net loss annually in excess of eighty-five thousand dollars ($85,000.00), and figuring return upon the investment plus federal taxes,

a net loss of one hundred thirty thousand dollars ($130,000.00), and wherein the defendant states that it is under the necessity of increasing its gross revenue by one hundred thirty thousand dollars ($130,000.00) annually to enable it to realize its expenses, depreciation, interest on investment and federal taxes.

4

That the above entitled action involves a controversy which is wholly between citizens of different states, in that the City of Texarkana, the plaintiff, is a municipal corporation and a body politic, incorporated under the laws of the State of Texas, and was at the time of the commencement of this suit in this Court, and still is, a citizen of the State of Texas and a resident of the County of Bowie in the Eastern Federal District of the State of Texas, Texarkana Division; and that your petitioner, defendant herein, is a private corporation incorporated under the laws of the State of Delaware, with its principal office in said State, [fol. 33] and was at the time of the commencement of said suit, and still is, a citizen and resident of the State of Delaware, residing at Wilmington, Delaware in said State where it has its principal office, and not a citizen or resident of the State of Texas.

5

That the time within which your petitioner, defendant herein, is required by the laws of this State and the rules of this Court to answer or plead to the declaration or petition in the above entitled action has not yet expired.

6

Your petitioner, defendant herein, presents herewith a bond with good and sufficient surety, conditioned that it will enter into the District Court of the United States for the Eastern District of Texas, Texarkana Division, within thirty days from the date of the filing of this petition, a certified copy of the record in this suit, and that it will pay all costs that may be awarded by said District Court in case the said Court shall hold that this suit was wrongfully or improperly removed thereto.

Wherefore, your petitioner prays that this Court proceed no further herein, except to accept said surety and bond,

and by order cause the record herein to be removed into said District Court of the United States within and for the [fol. 34] Eastern District of Texas, Texarkana Division of said Court of the State of Texas, according to the statute in such cases made and provided.

Southern Cities Distributing Company, Petitioners,
by H. C. Walker, W. H. Arnold, Arnold & Arnold,
King, Mahaffey, Wheeler & Bryson, Its Attorneys.

Duly sworn to by Jno. J. King. Jurat omitted in printing.

[fol. 35] Bond on removal for $500.00, approved November 24, 1933, omitted in printing.

[fol. 36] In the District Court of Bowie County

[Title omitted]

Order of Removal

On this the 24th day of November, A. D., 1933, came on to be heard the petition of the defendant, Southern Cities Distributing Company, for the removal of this cause from this Court to the District Court of the United States for the Eastern District of Texas, Texarkana Division, which petition, together with the bond for removal, together with the original of the notice of the filing of same with the waiver of the attorney for the plaintiff endorsed thereon, was heretofore filed in this cause, and said defendant appearing by its Attorneys, presented said petition and bond, and thereupon the Court considering same finds that said petition is in due form and presents a cause for the removal prayed for, and that said bond is sufficient both in form and as to the surety, and it thus appearing that the prayer for removal should be granted:

It is, therefore, ordered, adjudged and decreed by the Court that the said bond for removal be and the same is hereby approved, and that said petition be granted, and said cause removed as prayed for, and the Clerk is directed to prepare a transcript of all the proceedings in this Court for the removal of said cause.

[File endorsement omitted.]

[fol. 37] Transcript of Record of Bowie District Court Was Filed in U. S. District Court, etc.

Transcript was filed in the District Court of the United States for the Eastern District of Texas, Texarkana Division on December 20, 1933.

In United States District Court for the Eastern District of Texas, Texarkana Division

No. —

The City of Texarkana, Texas, Plaintiff,

vs.

Southern Cities Distributing Company, Defendant

Defendant's Answer and Cross-Action—Filed December 20, 1933

To the Honorable Judge of said Court:

1

Now comes the defendant, Southern Cities Distributing Company, and in answer to the petition of plaintiff, denies each and all of the allegations in plaintiff's petition contained, except as hereinafter expressly admitted.

2

Defendant admits that it is attempting to raise the rates of gas to its consumers in Texarkana, Texas, as stated in its application marked Exhibit B to plaintiff's petition. [fol. 38] Defendant states that such attempt on its part is not in violation of the law.

3

Defendant denies that it is attempting to put into effect said rates without pursuing the remedies provided by law, and in open disregard of the laws of Texas providing a machinery for securing an increase in rates.

4

Defendant states that Section VIII-A of the franchise ordinance referred to in plaintiff's petition is invalid in that it attempts to make binding provisions as to rates, which shall suspend the governmental power of the council which is subject to exertion at any time. Said governmental power of regulation of rates cannot be suspended for any definite and certain period, but the rates fixed are subject to change at any time thereafter, either upon the initiation of the City, or upon the application of the company. The said Section VIII-A of said franchise is not binding on the defendant for want of mutuality, and for the reason that it is unilateral, and for the further reason that the City lacks the power to make any binding agreement which shall hold in abeyance the governmental power over rates.

5

It is true as alleged that defendant did on November 3, 1933 file an instrument in writing styled "Notice and Appli- [fol. 39] cation of Southern Cities Distributing Company for Change and Modification of Rates, and Application for New Rates to Go Into Immediate Effect;" said Southern Cities Distributing Company also filed on the 7th day of November, 1933 its "Motion for Prompt Hearing and Action" on account of daily confiscation, and also filed affidavits as exhibits thereto. The Council thereafter met on the 13th day of November, 1933, and brought up the said application and motion, and refused to give the defendant a preliminary hearing, and refused to give it any sort of hearing, but passed a resolution or ordinance dated November 13, 1933, prohibiting the Southern Cities Distributing Company from putting into effect the rates specified in its application.

6

Defendant here reiterates the allegations contained in its said application and in its said motion and affidavits, and makes them a part hereof by reference without repeating them at this point.

7

Defendant, therefore, states that it has done all it could to get temporary relief pending final hearing before the

City Council of Texarkana, Texas, and that it has not succeeded in getting any relief whatever, although it has continued to and continues to and will still continue to suffer daily losses amounting to confiscation, and will have no [fol. 40] remedy for what it shall have lost before the state legislative procedure is finished.

8

Defendant states that its attempt to secure relief is not in violation of any valid provision of its franchise ordinance, and is not in violation of the laws of the State of Texas, and denies that the putting into effect of said rates will work irreparable injury upon the gas consumers in Texarkana, Texas.

9

Now comes the defendant, Southern Cities Distributing Company, and by way of affirmative defense and counterclaim and cross bill against the plaintiff, City of Texarkana, Texas, alleges as follows:

10

Defendant states that to protect its property from confiscation, it is attempting to raise the rates of gas to its consumers in Texarkana, Texas, as stated in its application marked Exhibit B to plaintiff's petition. Defendant states that such attempt on its part is not in violation of the law.

11

Defendant states that Section VIII-A of the franchise ordinance referred to in plaintiff's petition is invalid in that it attempts to make binding provisions as to rates, which shall suspend the governmental power of the Council [fol. 41] which is subject to exertion at any time. Said governmental power of regulation of rates cannot be suspended for any definite and certain period, but the rates fixed are subject to change at any time thereafter, either upon the initiation of the City or upon the application of the company. Said Section VIII-A of said franchise is not binding on the defendant for want of mutuality, and for the reason that it is unilateral, and for the further reason that the City lacks the power to make any binding agree-

ment which shall hold in abeyance the governmental power over rates.

12

Defendant, on November 3, 1933, filed an instrument in writing styled "Notice and Application of Southern Cities Distributing Company for Change and Modification of Rates, and Application for New Rates to Go into Immediate Effect;" said Southern Cities Distributing Company also filed on the 7th day of November, 1933, its "Motion for Prompt Hearing and Action" by the Council on account of daily confiscation, and also filed affidavits as exhibits thereto. The Council thereafter met on the 13th day of November, 1933, and brought up the said application and motion, and refused to give the defendant a preliminary hearing, and refused to give it any sort of hearing, but passed a resolution or ordinance dated November 13, 1933, prohibiting the Southern Cities Distributing Company from [fol. 42] putting into effect, even pending hearing, the rates specified in its application.

13

Defendant here reiterates the allegations contained in its said application and said motion and affidavits attached to plaintiff's petition, and makes them a part hereof by reference without repeating them at this point.

14

Defendant, therefore, states that it has done all it could to get temporary relief pending final hearing before the City Council of Texarkana, Texas, and that it has not succeeded in getting any relief whatever, although it has continued to and continues to and will still continue to suffer daily losses amounting to confiscation, and will have no remedy for what it shall have lost before the state legislative procedure is finished.

15

Defendant states that the City is attempting to give force and vitality to said Section VIII-A of its franchise ordinance, and that such attempts on the part of the City are in violation of the law, and that the said section should be cancelled and annulled.

Defendant states that the attempts of the City, to prevent it from charging the rates applied for, is to impose [fol. 43] upon the defendant a daily loss amounting to daily confiscation of its property; that any lower rates will fail to yield revenue sufficient to pay expenses of operation, depreciation, taxes and a reasonable return upon the fair value of its property. That the attempt of the City to enforce it to charge less rates than those applied for will deprive it of its property to its damage in a sum or value exceeding three thousand dollars ($3,000.00), exclusive of interest and costs, without due process of law, and without equal protection of the law; that under the Fourteenth Amendment to the Constitution of the United States, no state shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law; and defendant does now plead and invoke said provision of the United States Constitution for protection of its property. That the attempts of the City, to keep defendant from putting into effect less rates than that applied for, are violative of these provisions of the United States Constitution, and defendant urges said constitutional provisions as a protection against said efforts of said plaintiff.

Wherefore, defendant prays that the temporary injunction be dissolved and set aside, that the petition of plaintiff be denied, and that Section VIII-A of the franchise ordinance be declared null and void, and be cancelled, and that defendant recover all costs herein incurred, and for such [fol. 44] other and further relief, general and special, in law and in equity, to which it may be entitled.

H. C. Walker & W. H. Arnold, Jr., Arnold & Arnold, King, Mahaffey, Wheeler & Bryson, Attorneys for Defendant, by Jno. J. King.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

In Equity. No. 106

[Title omitted]

AMENDED AND SUBSTITUTED BILL IN EQUITY—Filed January 15, 1934

Comes the plaintiff, The City of Texarkana, Texas, and first having asked and obtained leave of the Court, files the following for its amended and substituted bill in equity in this cause.

[fol. 45] I

The City of Texarkana, Texas, is a municipal corporation organized under the laws of the State of Texas, and it originally brought this suit in the State Court, and now files its amended and substituted bill herein as the representative of and as trustee for all the consumers of natural gas in said City.

The Southern Cities Distributing Company is the holder of a franchise for the distribution of natural gas in the City of Texarkana, Texas, and owns and operates a natural gas distributing plant in said City.

On March 13, 1923, the City Council of the City of Texarkana, Texas, passed an ordinance at the request of the Southwestern Gas and Electric Company, which then owned the natural gas franchise in said City, amending said franchise and granting to said Company an increase in rates. A copy of said franchise of 1923 is hereto attached, marked Exhibit "A," made a part hereof and referred to herein as such.

Thereafter, in 1928, said Southwestern Gas and Electric Company transferred its franchise to the Southern Cities Distributing Company.

In 1930 the Southern Cities Distributing Company applied to the City Council for an increase in rates, and, after a hearing, the Council rejected this application and said Southern Cities Distributing Company then appealed to the Railroad Commission of the State of Texas, and said Railroad Commission came to Texarkana and conducted hearings on said appeal on May 28 and 29, 1930. [fol. 46] While the hearing was going on and while testimony was being taken before the Railroad Commission, and before any finding or order had been made or considered, the Southern Cities Distributing Company proposed

to the City Council a compromise of said rate controversy and said compromise was then and there agreed upon between the City Council of Texarkana, Texas, and said Southern Cities Distributing Company. Said hearing before the Railroad Commission was thereupon discontinued and no finding was made and no order was entered by said Commission in said matter.

The City Council thereafter passed an ordinance in the nature of a franchise contract setting up the terms of said compromise agreement with said Southern Cities Distributing Company. This ordinance, because of the provision of law as to publication, could not be passed at once, but it was passed and approved on June 13th, 1930, and was accepted and agreed to by said Southern Cities Distributing Company by an instrument in writing dated June 17th, 1930, and filed with the City Secretary on June 18th, 1930. A copy of this franchise agreement, together with a copy of said instrument of agreement and acceptance is hereunto attached as Exhibit "B," made a part hereof and referred to herein as such.

By reason of such acceptance, the defendant, Southern Cities Distributing Company, became bound to the City of Texarkana, Texas, and to the consumers of gas therein to carry out the terms of said franchise agreement and to [fol. 47] supply gas under the rates, terms and conditions therein granted, established and agreed to.

The plaintiff says that the Southern Cities Distributing Company accepted said franchise with all its terms and conditions and has since enjoyed the benefits thereof, and is now estopped from attacking any of the terms or conditions therein contained.

The plaintiff especially pleads Section VIII-A of said franchise and ordinance agreement, which is as follows:

"Section VIII-A. In consideration of the granting of this franchise, it is mutually agreed and understood by and between the parties hereto that before the City Council of said City shall apply for a reduction in rates, or before the Southern Cities Distributing Company, its successors or assigns, shall make application for an increase in rates, either party shall give to the other party one year's notice in writing of its intention to so apply for an increase or decrease in rates, and no application for increase or decrease in rates shall be acted upon or considered unless

said one year's notice is first given before making such application."

Said franchise agreement has not been amended, modified or repealed, nor has any attempt been made to amend, modify or repeal said agreement in any manner.

The Southern Cities Distributing Company did on the 3rd day of November, 1933, file with the City Secretary an instrument in writing styled "Notice and Application of Southern Cities Distributing Company for Change and [fol. 48] Modification of Rates to Go Into Immediate Effect." A copy of said notice is hereto attached, marked Exhibit "C," and made a part hereof.

Notwithstanding Section VIII-A of said franchise agreement the Southern Cities Distributing Company stated in its notice aforesaid that it would place the proposed increased rates into effect on November 23rd, 1933.

The plaintiff says that said notice that said increased rates would be placed into effect on November 23rd, 1933, and the attempt of said Southern Cities Distributing Company to place same in effect was not only in violation of Section VIII-A of said franchise agreement but was also in violation of the statute of the State of Texas providing a means and method by which increased rates might be obtained through hearings before an administrative tribunal endowed with the legislative power to fix rates for the future. The plaintiff does not admit that Section VIII-A of said franchise agreement is not binding upon the defendant but it alleges and insists that same is a valid and binding contract and agreement, that the defendant had the power to waive any right granted it by the Statutes of Texas to obtain increased rates upon a hearing after sixty days' notice, or upon a hearing before the Texas Railroad Commission to be held within sixty days after an appeal is filed, and that the defendant did waive this right in consideration of the increased rates granted to it by said compromise agreement and embodied in the franchise agreement of June 13th, 1930.

[fol. 49] The plaintiff says further that in the event it should be mistaken in its contention that Section VIII-A of said franchise agreement is valid and binding upon the defendant, that nevertheless the defendant had no right to place said rates into effect on November 23, 1933, or at any other time or in any other manner than is provided

by the Statutes of the State of Texas. Said statutes provide that the Southern Cities Distributing Company may apply to the City Council for a raise in rates and that the City Council must hear and determine said application within sixty days. Said statutes further provide that the Gas Company may take an appeal to the Texas Railroad Commission and that said Commission must hear and determine said appeal within sixty days. Said time limitation may be extended by an agreement between the parties, but said Southern Cities Distributing Company could not be compelled to enter into such agreement. Said statutes provide a speedy remedy for securing proper rates before administrative tribunals endowed with the legislative power to fix rates for the future. Said statutes also provide that pending the hearing before the City Council said increased rates should not be placed into effect, and in the event of an appeal, they should not be placed into effect until the appeal should be passed upon by the Railroad Commission.

The plaintiff says that the attempt of the Gas Company to place said rates into effect on twenty days' notice was in violation not only of Section VIII-A of its franchise but was also in violation of the rate-regulating statutes of the [fol. 50] State of Texas, and for these reasons the plaintiff, as the representative of and as trustee for the gas consumers in said City, filed its original petition herein in the State Court, in which it asked that the defendant be restrained from placing said rates into effect in violation of its franchise agreement and also pleaded that if for any reason it was not entitled to an injunction to secure specific performance of said franchise agreement, then that the defendant should be enjoined from increasing its rates in any manner other than that provided by law, and it was upon these facts and upon this contention that the temporary injunction was granted by the State Court.

On the 4th day of November, 1933, the defendant filed with the City Secretary of the plaintiff City, an instrument in writing as follows:

"Texarkana, Texas,
November 2nd, 1933.

"To the Honorable Mayor and Members of the City Council of the City of Texarkana, Texas:

"You are hereby notified pursuant to the terms of a certain franchise, dated June 13, 1930, that the grantee therein,

Southern Cities Distributing Company, will apply for an increase in rates one year after date of giving this notice.

"This notice contemplated an application for an increase in rates over such rates as have been applied for pursuant to the application of said grantee, Southern Cities Distrib-
[fol. 51] uting Company, now pending, for an immediate increase in rates upon which Southern Cities Distributing Company is requesting and will seek prompt hearing and action.

"Southern Cities Distributing Company, by Paul F. McBride, General Manager."

"Filed: G. D. Garrett, City Secretary, November 4, 1933."

The plaintiff says that, upon the facts hereinbefore set out and pleaded, it is entitled to an order making perpetual the temporary injunction heretofore granted by the State Court herein, and that the defendant should be enjoined from increasing or attempting to increase its rates in violation of Section VIII-A of its franchise agreement as hereinbefore pleaded. If for any reason the Court should find the plaintiff is not entitled to an injunction to secure specific performance of said Section VIII-A, then the plaintiff says further that it is entitled to an injunction preventing the defendant from increasing or attempting to increase its rates in any manner other than that provided by the statutes of the State of Texas governing the regulation of utility rates.

II

The plaintiff says further that since its original petition was filed herein in the State Court, other matters have arisen which entitle it and entitle the gas consumers of the
[fol. 52] City of Texarkana, Texas, to other and further relief in addition to that which it sought in its original petition in the State Court. These new facts give rise to an additional cause of action between the gas consumers of the City of Texarkana, Texas, and this plaintiff as their representative, and the defendant, the Southern Cities Distributing Company, which additional cause of action arose out of the same franchise agreements hereinbefore pleaded, and have reference to the rates collected by the defendant in the City of Texarkana, Texas, and are proper causes of action to be joined in this suit, and said causes of action

are such that if such gas consumers or if the plaintiff, as the representative of such gas consumers should bring a separate suit in this Court on such cause of action the same would be properly consolidated herewith for purpose of trial, and if such separate suit was brought in the state court it could be and probably would be removed to this Court and when here could be properly consolidated with this suit for purpose of trial, and all such causes can and should be conveniently disposed of together and the plaintiff here pleads and asserts and asks relief thereon so as to avoid multiplicity of actions.

The plaintiff in this section of its bill, as well as the other parts of its bill herein, is suing not only for its own benefit as a consumer of gas but is suing as the representative of and trustee for and for the use and benefit of all of the gas consumers in the City of Texarkana, Texas. These [fol. 53] consumers are very numerous, there being more than 3500 of them, and they are so numerous as to make it impracticable to bring them all before the Court. The claim of all of these gas consumers against the defendant is based upon the same facts, arise out of the same contract provisions, and said consumers as a whole constitute a class all of whom have the same rights against the defendant and as to whom, insofar as the matters herein alleged and pleaded are concerned, the defendant has the same defenses, if it has any defenses. This plaintiff is the representative of all such consumers. The statutes of the State of Texas confer upon this plaintiff as such representative the right to make franchise contracts as to the distribution of gas and the rates at which it should be distributed and also confers upon it as a representative of such consumers certain rate regulating powers and also the power to represent such consumers on any appeals taken from rate decisions made by it.

Under such powers and as the representative of such consumers, the City entered into the franchise agreement and contract with the Southwestern Gas and Electric Company dated March 13, 1923, a copy of which has been heretofore set forth as an exhibit to this bill. Said franchise of 1923 provided, in part, as follows:

"Article E.: It is further understood between the said Southwestern Gas & Electric Company, its successors and assigns, and the City of Texarkana, Texas, that the said

[fol. 54] Southwestern Gas & Electric Company shall not at any time charge for furnishing gas either to domestic or industrial consumers in the City of Texarkana, Texas, a greater sum or charge than it at the same time charges and collects from like consumers for similar service in the City of Texarkana, Arkansas."

Thereafter, as hereinbefore set out, said franchise was transferred by said Southwestern Gas and Electric Company to the defendant in this case. The franchise agreement entered into between the City and the defendant on June 13, 1930, and accepted and agreed to by the defendant as heretofore described, a copy of which franchise and which acceptance and agreement have been heretofore made a part of this bill, contained the following provision:

"Section IX. If Grantee shall be finally compelled to, or should voluntarily, place in any rates in the City of Texarkana, Arkansas, less than the rates granted by this Ordinance, then and thereupon the lessened rate shall apply in the City of Texarkana, Texas, and Grantee shall not be authorized or permitted to charge and collect any higher rate."

The plaintiff says that said provision of said franchise of 1923 and said provision of said franchise of 1930 were accepted and agreed to by the grantees of said franchises in both cases, in consideration of the agreement on the part of the City that certain increased rates should be collected. [fol. 55] And said agreements, more especially the agreement contained in the franchise of 1930, are valid and binding contracts on the part of the defendant. Said provision is a just and proper provision to prevent discrimination against the gas consumers in the City of Texarkana, Texas. The City of Texarkana, Texas, and the City of Texarkana, Arkansas, are one community, being separated only by a state line. The natural gas distributing plant owned by the Southern Cities Distributing Company serves both cities; consumers in Texarkana, Arkansas, are served from identically the same mains as consumers in Texarkana, Texas, and all of the gas which supplies both cities is purchased at the town borders of Texarkana, Texas, from the Arkansas and Louisiana Pipe Line Company, a copy all of whose stock, except the qualifying shares of directors, is owned

by the Arkansas Natural Gas Corporation, which corporation also owns all of the stock of the Southern Cities Distributing Company, the defendant in this case. Said provision in said franchise does not waive any of the rate regulating powers conferred upon the City Council by the statutes of the State of Texas, and it is a just and proper provision to prevent discrimination against the consumers in Texarkana, Texas. Said agreement was within the corporate powers of the Southern Cities Distributing Company. Its predecessor in title made such agreement in 1923 as one of the considerations to induce the City to grant increased rates at that time without a contest or controversy in the [fol. 56] Courts. The present defendant made such agreement in 1930 as one of the considerations to induce the City to enter into a compromise agreement with it granting increased rates at a time when a controversy over such increased rates was being actually contested before the Texas Railroad Commission. Said agreement is a valid and binding agreement. The defendant proposed such agreement to the City Council and has been exercising and enjoying the privileges conferred upon it therein.

At the time said compromise agreement was made, a similar compromise agreement was entered into between the Southern Cities Distributing Company and the City of Texarkana, Arkansas, whereby the same rates agreed to in Texas were to be placed in effect in Texarkana, Arkansas. Referendum petitions against such compromise agreement were at once circulated in Texarkana, Arkansas, and given a great deal of publicity in the newspapers. These petitions were circulated and this publicity took place prior to the action of the Council on June 13, 1930, in passing said franchise ordinance. It was then contemplated by both parties that said compromise agreement in Arkansas might be upset by means of said referendum petitions, and said Section IX of said franchise agreement was designed to take care of the situation in the event said compromise agreement should be upset in Texarkana, Arkansas.

Thereafter, as a result of said referendum petitions, said compromise agreement was upset, rejected, nullified and set aside as to Texarkana, Arkansas. The constitution of [fol. 57] that State provides that any measure against which a referendum petition is filed shall remain in abeyance until the election is held. Because of litigation said referen-

dum election was not held until May 28th, 1932, at which time said compromise agreement was overwhelmingly rejected. On the same day, to-wit, May 28th, 1932, the Southern Cities Distributing Company filed a suit in the United States District Court in Arkansas to prevent referendum election from having any effect. This suit has been finally decided and on December 1, 1933, the United States District Court for the Western District of Arkansas entered its final decree in said matter, a copy of which decree is hereto attached, marked Exhibit "D" and made a part hereof.

This decree orders, among other things, the following:

1. That on and after December 1, 1933, the Southern Cities Distributing Company should supply gas to the consumers in Texarkana, Arkansas, at the old rates which were in effect prior to said compromise agreement of May, 1930, which old rates are the same as those set forth in the franchise agreement of 1923 between the City of Texarkana, Texas, and the Southwestern Gas and Electric Company, a copy of which has been heretofore made a part of the bill, and which were the same rates which were in effect in Texarkana, Texas, prior to the compromise agreement of May, 1930, as embodied in said franchise of June 13, 1920. Said [fol. 58] Southern Cities Distributing Company has complied with said order of the District Court and is now supplying gas to the consumers in the City of Texarkana, Arkansas, at said old and lower rates.

In violation of Section IX of its franchise agreement said defendant has failed and refused to put said lower rates in effect in Texarkana, Texas, and is still charging its consumers in Texarkana, Texas, at the higher rates provided for in said compromise agreement. The City Council has called upon the defendant to comply with said Section IX of its franchise agreement and to place in effect in Texarkana, Texas, the lower rates which it is now charging in Texarkana, Arkansas, and has called upon it to stop and desist from discriminating against the gas consumers of Texarkana, Texas; and said defendant has failed and refused to stop the discrimination and has failed and refused to comply with its franchise agreement and is still continuing to charge and exact from the consumers of gas in Texarkana, Texas, the higher rates provided in its franchise agreement of June, 1930, which rates are higher than those

which it is now collecting from its consumers in Texarkana, Arkansas.

2. Said decree of December 1, 1933, in the United States District Court for the Western District, also determined that the collection by the defendant of the rates provided in said compromise agreement of May, 1930, from the time when said rates were placed in effect in June, 1930, down to and including its collections up to December 1, 1933, were [fol. 59] unlawful and illegal insofar as the rates exceeded those in effect in said City prior to May, 1930, and said Court ordered said defendant to make refunds to all of its consumers in Texarkana, Arkansas, of the difference between the amounts actually collected by it under the rates provided in said compromise agreement and the amounts which it should have collected under the rates which were lawfully in effect, which rates the Court found and determined to be the rates which were in effect prior to said compromise agreement and which this plaintiff alleges to be the rates set up in the franchise of March, 1923, which has been heretofore made an Exhibit to this bill.

The plaintiff says that the consumers of gas in the City of Texarkana, Texas, are entitled to an order from this Court directing said Southern Cities Distributing Company to at once place in effect in the City of Texarkana, Texas, the rates which it is now applying in the City of Texarkana, Arkansas, and that such consumers are further entitled to an order and judgment from this Court directing the defendant to make refunds to such consumers for the excess collected by said Company from the time said increased rates were put into effect in June, 1930, down to the date of the decree herein, over and above the amount which was due to said Company under the rates provided in said franchise agreement of 1923. The plaintiff says that said decree of the United States District Court in Arkansas compelled the defendant to place in effect in Texarkana, Arkansas, as of [fol. 60] May 30th, 1930, rates less than the rates shown in the franchise agreement of June 13th, 1930, between this plaintiff and this defendant, and that said franchise agreement provides that if said defendant is compelled to place any such lower rates in effect in Texarkana, Arkansas, that the lesser rate shall apply in the City of Texarkana, Texas.

The plaintiff says further that it has received from numerous gas consumers in the City of Texarkana, Texas, assign-

ments to the plaintiff of a part of such refunds as may be due them and that such assignments were granted to the City for the purpose of paying the expenses of this litigation and for the purpose of paying the expenses of the present controversy now pending before the Council as to increased rates, and that it would be unfair and unjust to this plaintiff to permit the defendant to defeat its right to recover under such assignments by any offsets which it might claim against such refunds arising on and after the date of the filing of this amended bill.

Premises considered, the plaintiff for its own use and benefit and as the representative of and as Trustee for all the consumers of gas in the City of Texarkana, Texas, and for the use and benefit of all such consumers of gas, prays:

1. That this Court should make perpetual the injunction heretofore issued ' .he State Court and should enjoin the defendant from raising and from attempting to raise its rates in violation of Section VIII-a of its franchise agreement of June, 1930.

[fol. 61] 2. If for any reason the plaintiff and the gas consumers of the City of Texarkana, Texas, are not entitled to an injunction to secure specific performance of Section VIII-a of said franchise agreement, then the plaintiff prays that the injunction heretofore granted by the State Court be made permanent, and that the defendant be enjoined from in any manner raising or attempting to raise its rates in the City of Texarkana, Texas, in any manner or at any time other than that provided by the statutes of the State of Texas for the regulation of such gas rates.

3. That the defendant be ordered and directed to comply with Section IX of its franchise agreement and to at once place in effect in the City of Texarkana, Texas, the rates for gas which it was compelled to place in effect in the City of Texarkana, Arkansas, by said Decree of December 1st, 1933, of the United States District Court for the Western District of Arkansas.

4. That the defendant be ordered and directed to file with the Clerk of the Court and to deliver a copy to this plaintiff, a statement under oath showing all monies collected by it from its consumers in Texarkana, Texas, under the rates provided in said franchise contract of June 13, 1930, from

the time said rates were first put into effect down to and including all collections under such rates as long as they are in effect, and shall show as to each of such consumers the name and address of each consumer, the amount of gas [fol. 62] supplied each month to each consumer, the amount collected each month from each consumer under such rates and the amount which would have been due from each consumer under the rates which are now in effect in Texarkana, Arkansas, and the difference for each month between the amount so collected and the amounts which would have been due under the rates now in effect in Texarkana, Arkansas, and that the Court should order said defendant to pay into the registry of this Court at the time such statement is filed the total excess between the amount so collected and the amount so due, without any deductions for any offset, setoff or counter-claims of any kind whatsoever, plus the fees, costs and commission to which the Clerk of the Court may be entitled for paying out such monies to the persons who may be then entitled to receive the same; that the plaintiff and each of the gas consumers be afforded access to the books and records of the Company for the purpose of checking such statement, and that they may be permitted such time as may be reasonable within which to call any errors in such statement to the attention of the Court.

5. For judgment for all its costs in and about this suit expended and for all other necessary or proper relief.

Ed. B. Levee, Jr., Attorney for Plaintiff.

[fol. 63] *Duly sworn to by Ed. B. Levee, Jr. Jurat omitted in printing.*

EXHIBIT "A" TO AMENDED BILL

An ordinance amending an ordinance fixing the rates which may be charged by the Southwestern Gas & Electric Company, its successors and assigns, for furnishing natural gas in the City of Texarkana, Texas, to gas consumers of said city, entitled: "An Ordinance fixing the rates which may be charged by the Southwestern Gas & Electric Company for furnishing gas under its franchise contracts with the City of Texarkana, Texas, and amending Section I of an ordinance amending an ordinance granting to E. J. Spencer and Thos. W. Crouch a fran-

[fol. 64] chise for the manufacture, sale and distribution of gas in the City of Texarkana, Texas, passed July 2, 1902, and supplemented August 5, 1903, which amendatory ordinance was approved March 23, 1908; and amending Section IV of an ordinance amending an ordinance passed by the City of Texarkana, Texas, on December 6, 1905, granting to the Citizen's Oil & Pipe Line Company, Limited, a gas franchise, which amendatory ordinance was approved March 23, 1908," passed by the City Council of Texarkana, Texas, and approved September 4, 1918:

Section 1. Be it ordained by the City Council of Texarkana, Texas, that Section I and Section II of an ordinance passed by the City Council of Texarkana, Texas, and approved September 4, 1918, entitled "An Ordinance fixing the rates which may be charged by the Southwestern Gas & Electric Company for furnishing gas under its franchise contracts with the City of Texarkana, Texas, and amending Section 1 of an ordinance amending an ordinance granting to E. J. Spencer and Thos. W. Crouch a franchise for the manufacture, sale and distribution of gas in the City of Texarkana, Texas, passed July 2, 1902, and supplemented August 5, 1903, which amendatory ordinance was approved March 23, 1908; and amending Section IV of an ordinance amending an ordinance passed by the City of Texarkana, Texas, on December 6, 1905, granting to the Citizen's Oil & Pipe Line Company, Limited, a gas franchise, which amendatory ordinance was approved March 23, 1908," be and the same is hereby amended to read as follows:

[fol. 65] Section 1. The Southwestern Gas & Electric Company, its successors and assigns are hereby granted the right to charge as a maximum price for furnishing natural gas in the City of Texarkana, Texas, to gas consumers of said City the following rates per one thousand (1000) cubic feet:

Article A. For furnishing natural gas for domestic and commercial purposes and for lighting or illumination in any character of institution whatsoever and for all other purposes — (except for gas used in internal combustion engines and except for fuel used under boilers and in furnaces where gas is used as a fuel for strictly manufacturing purposes) — fifty cents (50¢) per one thousand (1000) cubic feet for all monthly consumption at any individual installation

ranging up to and including one hundred thousand (100,000) cubic feet, and twenty-two cents (22¢) per one thousand (1000) cubic feet for all monthly consumption at any individual installation above one hundred thousand (100,000) cubic feet, with ten per cent (10%) discount applying on monthly accounts for services rendered at any individual installation when accounts for services rendered are paid at the company's office on or before ten (10) days following date of bill.

Article B. For furnishing natural gas for use as fuel within boilers and furnaces only, for the consumption of gas as fuel for strictly manufacturing purposes, the following schedule of net rates per one thousand (1000) cubic feet [fol. 66] shall apply for monthly consumption at any individual installation:

Consumption of Gas per month in cubic feet	Net rate per one thousand (1000) cubic feet
First Five hundred thousand (500,000) cubic feet	Twenty-one cents (21¢) net
Next One Million (1,000,000) cubic feet	Twenty cents (20¢) net
Next One Million (1,000,000) cubic feet	Nineteen cents (19¢) net
Next One Million (1,000,000) cubic feet	Eighteen cents (18¢) net

and for all monthly consumption at any individual installation above three million five-hundred thousand (3,500,000) cubic feet per month seventeen cents (17¢) net per one thousand (1000) cubic feet, with the understanding that bills for monthly consumption shall be rendered at a gross rate of ten per cent (10%) higher than the foregoing net prices, which additional amount of billing will be allowed as a discount, provided bills for each month's service are paid at the company's office within ten (10) days following date of bill.

Article C. For natural gas furnished for use in internal combustion engines the rate shall be forty cents (40¢) per one thousand (1000) cubic feet for all monthly consumption at any individual installation, with ten per cent (10%) discount when bills for monthly services rendered are paid at the company's office within ten (10) days following date of bill.

[fol. 67] Article D. In the event that the consumption of gas by any consumer at any individual installation under the rates herein prescribed does not amount to a net sum of fifty cents (50¢) for any one month, then the said Southwestern Gas & Electric Company, its successors and assigns, are hereby granted the right to charge such consumer for each installation a net sum of fifty cents (50¢) for such month's service, whether there is any consumption of gas or not, said charge to be known as "a minimum charge," and to be of the same amount and nature as the charge hereinbefore prevailing in Texarkana, Texas.

Article E. It is further understood between the said Southwestern Gas & Electric Company, its successors and assigns, and the City of Texarkana, Texas, that the said Southwestern Gas & Electric Company shall not at any time charge for furnishing gas either to domestic or industrial consumers in the City of Texarkana, Texas, a greater sum or charge than it at the same time charges and collects from like consumers for similar service in the City of Texarkana, Arkansas.

Section 2. Be it further ordained that this ordinance shall take effect and be in force from and after its passage and approval as required by law.

Passed and approved this 13 day of March, A. D. 1923.
(Signed) G. W. Middleton, Mayor.

Attest: (Signed) W. H. James, City Secretary. (Seal of Corporation of Texarkana, Texas.)

[fol. 68] I, G. D. Garrett, the duly elected and qualified City Secretary of the City of Texarkana, Texas, do hereby certify that the foregoing is a true and correct copy of the franchise entered into by and between the City of Texarkana, Texas, and the Southwestern Gas & Electric Company on March 23, A. D. 1923.

G. D. Garrett, City Secretary. (Seal.)

January 15, A. D. 1934.

Item No. 9:

Exhibit "B": Ordinance of June 13, 1930 and acceptance. Do not copy, refer to Exhibit "A" of the Original Petition, Item 1.

Exhibit "C": Notice and Application of Southern Cities Distributing Company for Change and Modification of Rates. Do not copy, refer to Exhibit "B" of Plaintiff's Original Petition, Item 1.

EXHIBIT "D" TO AMENDED BILL

IN THE UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF ARKANSAS, TEXARKANA DIVISION

In Equity. No. 203

SOUTHERN CITIES DISTRIBUTING CO., Plaintiff,

vs.

CITY OF TEXARKANA, ARKANSAS, et al., Defendants

DECREE

On this the 1st day of December, 1933, comes the City of Texarkana, Arkansas, et al., by Willis B. Smith, City Attorney, and B. E. Carter, its attorneys; and comes the Southern Cities Distributing Company by W. H. Arnold and Wil- [fol. 69] liam H. Arnold, Jr., its attorneys, and this cause is submitted to the court upon the mandate of the United States Circuit Court of Appeals for the Eighth Circuit filed herein on November 21, 1933; and upon a certified copy of an order entered by said Circuit Court of Appeals on November 21, 1933, and filed herein on November 25, 1933; and upon the motion filed by said City on November 22, 1933, for a decree on the mandate and for a decree on the cross bill; and upon the petition of the City of Texarkana, Arkansas, filed herein on October 25, 1933, setting up a claim to certain refunds by reason of alleged assignments for same; and upon the petition of B. E. Carter for attorney's fees, filed herein on October 25, 1933; and upon the motion of the Southern Cities Distributing Company, filed herein on this date to dismiss the cross bill; and upon the answer of said Southern Cities Distributing Company, filed herein on this day, to the petition of the City of Texarkana with reference to said assignments and to the petition of B. E. Carter for attorney's fees; and upon the

affidavit of Paul E. Clay, filed by said Southern Cities Distributing Company in connection with its said answer.

The court having heard said pleadings and the argument of counsel and being well and sufficiently advised as to the facts and the law finds, makes and enters the following orders and decrees:

It is by the court considered, adjudged and decreed that on and after December 1, 1933, the Southern Cities Dis-[fol. 70] tributing Company cease charging gas consumers connected to its Texarkana, Arkansas distributing plant for gas under rates put into effect by a resolution passed by the City Council of the City of Texarkana, Arkansas, dated May 30, 1930, which rates are as follows:

Domestic and Commercial Rates

(a) For the first one thousand (1000) cubic feet per meter of gas or fraction thereof sold to any domestic or commercial consumer during any one month—$1.00 per thousand cubic feet. Said charge shall also be made regardless of whether any gas is consumed or not.

(b) For the next one hundred and forty-nine thousand (149,000) cubic feet of gas or fraction thereof sold to any domestic or commercial consumer during any one calendar month—$.50 per thousand cubic feet. All gas sold at $.50 per thousand cubic feet is subject to 5% discount if paid within ten (10) days after bill is rendered.

(c) For all gas sold to any one domestic or commercial consumer during any one calendar month in excess of one hundred and fifty thousand (150,000) cubic feet—$.25 per thousand cubic feet. All gas sold at $.25 per thousand feet is subject to $.02 per thousand cubic feet discount if paid within ten days after bill is rendered.

[fol. 71] A charge of $1.00 shall be made for each connect or disconnect, after first installation, that is made for the same consumer, at the same address, except where meter is removed to be replaced, repaired or for inspection.

Churches, schools or colleges maintained by State, County or City; schools or colleges maintained by any religious organizations; public hospitals shall be allowed a gross discount of 40% from the gross rate for domestic and commercial gas when bills are paid within ten days after being

rendered. Municipal buildings shall be allowed free gas for all gas used in conducting the City's business.

Industrial Rates

All industrial consumers shall be served by contract, the rates for the first three million, five hundred thousand (3,500,000) cubic feet shall be as follows:

(a) First 500 M cubic feet or fraction thereof sold in any one calendar month to one industrial consumer—$.21 per M cubic feet.

(b) Next 1,000 M cubic feet or fraction thereof sold in any one calendar month to one industrial consumer—$.20 per M cubic feet.

(c) Next 1,000 M cubic feet or fraction thereof sold in any one calendar month to one industrial consumer—$.19 per M cubic feet.

[fol. 72] (d) Next 1,000 M cubic feet or fraction thereof sold in any one calendar month to one industrial consumer—$.18 per M cubic feet.

Each industrial consumer using over 3,500 M cubic feet per month shall be subject to be served under a special contract executed between the Grantee and the consumer at rates to be mutually agreed on by them provided, however, that in no case shall there be any discrimination in rates between industrial consumers so served while they are engaged in the same character of business and using substantially the same quantities of gas under substantially the same load factors, and a copy of such private contracts shall be subject to inspection of the Mayor or any member of the City Council at any time.

A minimum charge of $35.00 per month per consumer shall be collected from those consumers to whom the industrial rates apply.

A penalty of 5% shall be added if bills are not paid within ten days after said bills are rendered.

It is further decreed that on all bills against its consumers issued on and after December 1, 1933, the Southern Cities Distributing Company shall charge for gas distributed in the City of Texarkana, Arkansas, at the rates which were in

effect prior to the passage of said resolution May 30, 1930, which rates are as follows:

[fol. 73] For furnishing natural gas for domestic and commercial purposes and for lighting or illumination in any character of institution whatsoever and for all other purposes—(Except for gas used in internal combustion engines and except for fuel used under boilers and in furnaces where gas is used as fuel for strictly manufacturing purposes)—fifty cents per one thousand cubic feet for all monthly consumption at any individual installation ranging up to and including one hundred thousand cubic feet, and twenty-two cents per one thousand cubic feet for all monthly consumption at any individual installation above one hundred thousand cubic feet, with ten per cent discount applying on monthly accounts for services rendered at any individual installation when accounts for services rendered are paid at the company's office on or before ten days following date of bills.

For furnishing natural gas for use as fuel within boilers and furnaces only for the consumption of gas as fuel or strictly manufacturing purposes, the following schedule of net rates per one thousand cubic feet shall apply for monthly consumption at any individual installation:

Consumption of Gas per Month in Cubic feet	Net rate per one Thousand Cubic Feet
First—Five hundred thousand cubic feet	Twenty-one cents net
Next—One Million cubic feet	twenty cents net
Next—One Million cubic feet	nineteen cents net
Next—One Million cubic feet	eighteen cents net

[fol. 74] And for all monthly consumption at any individual installation above three million five hundred thousand cubic feet per month seventeen cents per one thousand cubic feet net, with the understanding that bills for monthly consumption shall be rendered at a gross rate of ten per cent higher than the foregoing net prices which additional amount of billing will be allowed as a discount, provided bills for each month service are paid at the company's office within ten days following date of bill.

For natural gas furnished for use in internal combustion engines the rates shall be forty cents per one thousand cubic feet for all monthly consumption at any individual installation, with ten per cent discount when bills for

monthly services rendered are paid at the company's office within ten days following date of bill.

In the event that the consumption of gas by any consumer at any individual installation under the rates herein prescribed does not amount to a net sum of fifty cents for any one month, then the said Southwestern Gas & Electric Company, its successors, and assigns, are hereby granted the right to charge such consumer for each installation a net sum of fifty cents for such month's service, whether there is any consumption of gas or not, said charge to be known as a "Minimum Charge" and to be of the same amount and nature as the charge hereinbefore prevailing in Texarkana, Arkansas, and vicinity.

If on account of non-payment of bills or violation of any rule or regulation, the said Southwestern Gas & Electric [fol. 75] Company is obliged to shut off the supply of gas of any consumer, a charge of one dollar will be made for turning same on again for such consumer so cut off, and a like charge will be made to each consumer requiring the moving of a meter oftener than once in any twelve month period, the charges under this Article being the same in amount and nature as the charges now and hereinbefore prevailing in Texarkana, Arkansas, and vicinity.

It is ordered that all bills rendered to consumers prior to December 1, 1933, and not paid as of that date and on which charges were made at the rates put into effect by said resolution of May 30, 1930, be paid by the consumers as rendered. The company is ordered to include all such bills rendered prior to December 1, 1933, in its statement and accounting to this court for refunds as hereinafter set forth.

It is further considered, ordered, adjudged and decreed by the court that the Southern Cities Distributing Company shall on or before December 15, 1933, file with the Clerk of this court, and deliver a copy to the City of Texarkana, Arkansas, a statement under oath showing all moneys collected by it from its consumers in Texarkana, Arkansas, under the rates provided in the resolution passed by the City Council of said city on May 30, 1930, from the time said rates were first put into effect down to and including all bills charged and collected against its consumers prior to December 1, 1933. Said statement to show the name and address of each consumer, the amount of gas supplied each [fol. 76] month to each consumer, the amount collected, the amount due under the rates which were applied in said city

immediately prior to May 30, 1930, and the difference between the amounts so collected and the amounts so due, and shall at the same time pay into the registry of this court the total excess between the amount so collected after said rates so provided by said resolution of May 30, 1930 were put into effect and the amount due under the rates as applied prior to May 30, 1930, plus the fees, costs and commissions to which the Clerk of this court may be entitled to receive for paying out such moneys to the persons entitled to receive the same. The City of Texarkana, Arkansas shall be afforded access to the books and records of said company for the purpose of checking such statement and may call any errors therein to the attention of this court for correction within 30 days after a copy of such notice is served upon said city.

Upon the filing of such statement and the payment of such moneys the Clerk of this court is directed to publish a notice in the Texarkana Press of Texarkana, Arkansas, once a week for two weeks, notifying all consumers of gas in said city and all persons who might have a claim to a refund on account of the collection of such rates that said statement has been filed and such moneys has been paid into court, and warning them to present within thirty days after the last publication of said notice any objections or exceptions that they or any of them may have to the amount of refunds shown to be due them on such statement, and warning them [fol. 77] upon their failure to do so said statement shall be taken as correct insofar as they are concerned.

After the time has expired within which consumers may file exceptions to the amount of refunds and after the time has expired within which the city may file exceptions to the amount of such refunds, and after this court shall have passed upon and settled any exceptions which may be filed as above provided, the Southern Cities Distributing Company and the sureties upon its bonds which have been filed in this court and in the United States Circuit Court of Appeals, shall stand discharged from any and all liability to the gas consumers of the City of Texarkana, Arkansas, and each and every one of them for its action in collecting said rates for gas set forth in said resolution of May 30, 1930, and each and every one of said consumers shall be, and they are hereby enjoined from bringing any action against said Southern Cities Distributing Company for such refunds in any other manner and any other court than as hereinabove provided and set forth. Such injunction is necessary on ac-

count of the number and character of the refunds and by reason of the fact that otherwise there would be confusion and multiplicity of suits, and the rights of any consumer cannot otherwise be properly determined; this court has ancillary jurisdiction thereof and exclusive jurisdiction, and the court further finds that there are adverse claimants and controverted questions of law and fact, common to all claims, which will determine the right of the consumers to recover and to whom the refunds or parts thereof shall be [fol. 78] paid; all of the refunds are commonly affected by said questions.

With reference to the petition of B. E. Carter for attorney's fees, it is ordered that the Clerk of this court at once publish notice in the newspaper above described, notifying all gas consumers in said city that said petition has been filed, asking for allowance of said fees amounting to one half of each and all of the refunds which may be found due in this proceeding, and warning said persons to file with the Clerk of this court within 30 days after the last publication of said notice any objections they may have to the granting of said petition. The costs pertaining thereto shall be paid by B. E. Carter.

With reference to the petition of the City of Texarkana, Arkansas, wherein it claims that it is entitled to receive all of certain refunds by reason of assignments from the various individual consumers, it is ordered that the Clerk at once publish notice of the filing of said petition once a week for two weeks in the newspaper above named, which notice shall set out the names of all the consumers listed in the exhibit attached to the petition of the city, and shall warn the persons named thereon to file with the Clerk of this court within 30 days after the last publication of said notice any objections which they may have to this court recognizing said assignments and ordering the payment of refunds assigned thereunder to the City of Texarkana, Arkansas. [fol. 79] The costs in connection with this petition, including the cost of publication, shall be at the expense of the city.

If any refund or any part of any refund is unclaimed or denied by June 1, 1934, it shall be repaid to plaintiff, or if plaintiff is required to pay any refund or any part thereof in any other manner, the refund in this court shall be re-paid to plaintiff.

The city shall file all assignments and the plaintiff is given permission to take possession of them for the purpose of auditing and checking.

Should the Southern Cities Distributing Company desire to mail notice to each consumer showing the filing of the statement of refunds, the matter of assignments and of the claim for attorney's fees, it may do so at its own cost, and upon said company making proof, by affidavit, of the mailing of such notices, same shall be construed as personal service upon each of said consumers to whom such notice is mailed.

The decree with reference to the rates to be charged after December 1, 1933, is without prejudice to the present proceedings before the City Council or to a new suit. The original bill filed herein on May 28, 1932, is dismissed.

Southern Cities Distributing Company requests that the city on its petition for refund be required to notify or cause to be notified each assignor or his representatives, and if they cannot be personally notified that they be notified in accordance with Section 57 of the Judicial Code. The said company objects to the manner of notifying the consumers [fol. 80] of the petition of the city by publication as set out in the decree and saves exceptions to the refusal of the court to cause proper notice to be given and to the publication of the notice as specified. The basis of this objection is that the order of the court would not be binding upon the gas consumers who are claimed to have signed the assignments and who in fact did not, or which are for some other reason defective and invalid, and on the ground that it is not a class proceeding, as each assignment presents a particular controversy.

That part of the decree objected and excepted to, reads as follows:

"With reference to the petition of the City of Texarkana, Arkansas, wherein it claims that it is entitled to receive all of certain refunds by reason of assignments from the various individual consumers, it is ordered that the Clerk at once publish notice of the filing of said petition once a week for two weeks in the newspaper above named, which notice shall set out the names of all the consumers listed in the exhibit attached to the petition of the City, and shall warn the persons named thereon to file with the Clerk of this Court within 30 days after the last publication of said notice

any objections which they may have to this court recognizing said assignments and ordering the payment of refunds assigned thereunder to the City of Texarkana, Arkansas."

(Signed) Heartsill Ragon, Judge.

Filed Dec. 1, 1933. Wm. S. Wellshear, Clerk.

[fol. 81] [File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER TO AMENDED AND SUBSTITUTED BILL IN EQUITY, AND AMENDED AND SUBSTITUTED ANSWER AND AMENDED AND SUBSTITUTED CROSS BILL AND COUNTER CLAIM—Filed March 9, 1934

To the Honorable Randolph Bryant, United States District Judge:

Now comes the defendant, Southern Cities Distributing Company, and in answer to the amended and substituted bill in equity, and by way of amendment and substitution of its original answer filed in this cause, pleads as follows:

[fol. 82] 1

Defendant denies each and all the allegations in plaintiff's amended and substituted bill in equity, except as hereinafter expressly admitted.

2

Defendant admits that prior to the passage or the granting of the franchise dated June 13, 1930 the Council held a hearing as to rates which should be charged by defendant, and that upon said hearing the rates to be charged by defendant for natural gas furnished under said franchise were fixed and allowed by the Council.

3

Defendant denies that it is estopped from properly applying the laws and constitution of the State of Texas to Sections VIII-A and IX of the franchise.

4

Defendant states that Section VIII-A of said franchise is invalid in that it conflicts with and violates the laws and constitution of the State of Texas for the power of rate regulation cannot be suspended or held in abeyance. Rates cannot be contracted out must be fixed under the regulatory powers. Said section is invalid because it attempts to make binding provisions as to rates, suspending the governmental power of the Council which is subject to exertion at any time; the governmental power of regulation of rates cannot be suspended for any definite and certain period of time, [fol. 83] but the rates fixed are subject to a change at any time thereafter, either upon the initiation of the city or upon the application of the company. Said Section VIII-A is not binding upon the city, and being unilateral, cannot be binding on the defendant for want of mutuality, and for the further reason that the city lacks the power to make any binding agreement which shall hold in abeyance its governmental power over rates.

5

Defendant admits that on the 3rd day of November, 1933, it filed with the City Secretary an instrument in writing styled "Notice and Application of Southern Cities Distributing Company for Change and Modification of Rates and Application for New Rates to Go Into Immediate Effect." Defendant states that said notice was not in violation of any valid provision of the franchise referred to, nor in violation of the Statutes of the State of Texas. Defendant also states that it filed on the 7th day of November, 1933, its "Motion for Prompt Hearing and Action," on account of daily confiscation, and also filed affidavits as exhibits thereto. The Council thereafter met on the 13th day of November, 1933, and considering said application and motion, refused to give the defendant a preliminary or any other hearing, but passed a resolution or ordinance dated November 13, 1933, prohibiting defendant from putting into effect the rates specified in its application. Defendant here reiterates the [fol. 84] allegations contained in its said application and in its said motion and affidavits, and makes them a part hereof by reference without repeating them at this point. But inasmuch as the plaintiff has made the application an exhibit to its amended bill, defendant does not attach copy of the

same. Defendant, therefore, states that it did all it could to get temporary relief pending final hearing before the City Council of Texarkana, Texas, and that it did not succeed in getting any relief whatever before said Council, although it has continued, continues and will continue to suffer daily losses amounting to confiscation, and will have no remedy for what it shall have lost before the state legislative procedure is finished. The Council on January 23, 1934, passed a resolution finally denying plaintiff's application for a change in rates, and plaintiff has filed an appeal with the Railroad Commission of Texas from said order and resolution, as well as appeal from the resolution of the Council calling upon the defendant to restore the rates of 1923, and defendant has not secured any relief yet. Defendant states that its attempts and efforts to secure relief are not in violation of any valid provisions of its franchise, and are not in violation of the laws of the State of Texas, but are in conformity therewith, and yet defendant has been unable to secure relief. Defendant makes a part of its answer its counter claim and cross bill by reference as the same follow. Defendant denies that it had the power to waive or avoid its right to seek reasonable remuneration [fol. 85] for furnishing gas in Texarkana, Texas, and denies that it did do so.

6

Defendant states that it did have the right to place into effect the rates applied for on November 23, 1933, and states that it has unlawfully been prevented from doing so as this defendant set up in its said notice and application filed with the City Council that the rates being charged were confiscatory and unreasonable, and that it was being subjected to daily confiscation and loss. Defendant has exhausted its remedy before the Council without avail, and has filed an appeal to the Railroad Commission of Texas, but is still being denied the right to charge reasonable rates, and is still being forced to charge confiscatory rates in violation of the Constitution of the United States. It has exhausted all remedies open to it without relief, and states that it is entitled to charge said rates applied for on account of daily confiscation. The remedy before the state administrative tribunal is not a speedy, adequate or secure remedy in case of daily confiscation, because as plaintiff alleges the Statutes of Texas "Also provide that pending the hearing before the

City Council said increased rates should not be placed into effect, and in the event of an appeal, they should not be placed into effect until the appeal should be passed upon by the Railroad Commission."

[fol. 86] 7

Defendant denies that its attempt to secure reasonable rates was in violation of any valid provisions of its franchise, or of the valid statutes of the State of Texas, but that it was in conformity with applicable procedure so far as defendant was able to follow the same in order to secure and bring itself within the protection of the Fourteenth Amendment to the Constitution of the United States, which provides that no person shall be deprived of his property without due process of law, or be denied equal protection of the laws.

8

Defendant denies that plaintiff is entitled to secure specific performance of Section VIII-A of said franchise in the manner and form in which it is claimed, or in any other manner, as said Section VIII-A is invalid, and defendant denies that plaintiff is entitled to an order making perpetual the temporary injunction granted by the state court from which this cause is removed, or that defendant should be enjoined from prosecuting its attempt to secure reasonable rates. Defendant states that the city is likewise not entitled to an injunction, preventing defendant from increasing or attempting to increase its rates in any manner other than that provided by the statutes of the State of Texas, because defendant has pursued the course laid down by such statutes and is still not able to get relief.

[fol. 87] 9

Defendant denies that Article E of the ordinance of the Council dated March 13, 1923, referred to by plaintiff, affecting the franchise of the Southwestern Gas & Electric Company, is now in force, as the old franchise of the Southwestern Gas & Electric Company has expired according to the terms of its duration, and has been superseded by the new franchise dated June 13, 1930. Defendant denies that under any circumstances said Article E could be binding, for the same reasons as those set out in relation to Section IX of the franchise dated June 13, 1930.

10

Defendant denies that Section IX of the franchise dated June 13, 1930 is valid, because it undertakes to deprive the City Council of Texarkana, Texas, of its lawful and sole jurisdiction, and because it undertakes to delegate to authorities outside of the State of Texas the power to regulate rates within the State of Texas. In the alternative, and in the alternative only, defendant states that said section does not mean what plaintiff claims it means, even if it should be held to be valid.

11

Defendant denies that said Section IX can be upheld to prevent the alleged discrimination against the gas consumers in the City of Texarkana, Texas, because the alleged discrimination cannot apply to divest the City Council of [fol. 88] Texarkana, Texas, of its jurisdiction and place it elsewhere, and cannot be made an issue herein. Defendant denies that Section IX of said franchise does not waive any of the regulating powers conferred upon the City Council of Texarkana, Texas, by the statutes of the State of Texas, and denies that the alleged discrimination is or can become an issue herein.

12

Defendant denies that at the time the franchise of June 13, 1930, was granted, referendum petitions in Arkansas were being circulated against the resolutions of May 30, 1930 of the City Council of Texarkana, Arkansas, and denies that such referendum petitions were given a great deal of publicity in the newspapers, and denies that said petitions and said publications took place prior to the action of the Council of Texarkana, Texas, on June 13, 1930; denies that it was then contemplated by both parties that said compromise agreement in Arkansas might be upset by means of said referendum petitions; and denies that Section IX of said franchise was designed to take care of the situation in the event said resolution of May 30, 1930, should be upset in Texarkana, Arkansas; but defendant states that Section IX of said franchise, if valid, is not ambiguous. Even if it should be held valid said provisions would only relate to rates to be charged in Texarkana, Texas, after December 1, 1933, and could not, according to its terms, be retroactive.

[fol. 89] Even if the court should hold said provisions valid, and if the court should further hold that it is ambiguous, the proper construction to be given to the facts and circumstances surrounding the agreement were not that the resolution of May 30, 1930, in Arkansas might be upset, as it was not prior to June 13, 1930, contemplated by anyone that there would be any litigation or contest over the validity of the resolution of May 30, 1930, in Arkansas. It was assumed and agreed by both parties that the rates fixed in the franchise of June 13, 1930, would be valid and binding until such time in the future as the rates in Arkansas might be reduced by a new application on the part of the city filed at some future date, and that was the only contingency contemplated by any of the parties at the time the franchise of June 13, 1930, was passed.

13

Defendant denies that it is now supplying gas to the consumers in the City of Texarkana, Arkansas, at the old and lower rates of 1923, but states that the fact is that it is supplying gas in Texarkana, Arkansas, on the same schedule of rates as those applied for in the City Council of Texarkana, Texas, on November 3, 1933, and which are the same rates that defendant is seeking to establish in Texarkana, Texas.

14

Defendant admits that the City Council of Texarkana, Texas, has ordered it to comply with Section IX of the [fol. 90] franchise as construed by the Council, and to place in effect in Texarkana, Texas, certain lower rates which were heretofore charged in Arkansas, but appeal from such order has been taken to the Railroad Commission of Texas. Defendant denies that it is under obligation to place into effect in Texarkana, Texas, rates which were formerly but which are not now charged in Texarkana, Arkansas. Defendant admits that against its will it has continued to charge only those rates which are specified in its franchise of June 13, 1930, but states that it is necessary to avoid confiscation of its property that it secure reasonable rates.

15

Defendant denies that the gas consumers in the City of Texarkana, Texas, are entitled to an order from this court

directing it at once to place in effect in Texarkana, Texas, the rates which it was but is not now applying in the City of Texarkana, Arkansas; denies that such consumers are entitled to an order and judgment from this court directing it to make refunds to such consumers for the excess collected by it from the time said franchise rates were put into effect in June, 1930, down to the date of the decree herein, over and above the amounts which plaintiff alleges were due to said company under the rates provided in the alleged franchise agreement of 1923. Defendant denies that plaintiff has received from numerous gas consumers in the City of [fol. 91] Texarkana, Texas, assignments to the plaintiff of a part of alleged refunds; and denies that defendant has been notified of any such assignments, and denies that it has been served with a copy of them, and denies that the assignments are valid insofar as this company is concerned, even if they are valid at all, until copies of such assignments are served upon it; denies that if it should ever come to the point where it would be material to consider refunds, that it would be unfair and unjust to permit this defendant to offset against the alleged refunds, any amounts which its gas consumers may owe it.

16

Defendant states that it has for some time been attempting to increase its schedule of rates in furnishing gas to the consumers in Texarkana, Texas; that its efforts have been in accordance with and not in violation of the laws and Constitution of the State of Texas and of the United States.

17

Defendant denies that it is attempting to put into effect the new rates applied for without pursuing the remedies provided by law, but that it is attempting to do so in conformity with the law, but that its efforts so far have proved unavailable.

18

Now comes the defendant, Southern Cities Distributing Company, and by way of affirmative defense and counter [fol. 92] claim and cross bill against the plaintiff, City of Texarkana, Texas, alleges as follows:

19

Defendant here reiterates all those parts of this pleading hereinabove set forth.

20

Defendant states that to protect its property from confiscation, it is attempting to raise the rates of gas to its consumers in Texarkana, Texas, as stated in its application marked Exhibit B to plaintiff's petition. Defendant states that such attempt on its part is not in violation of the law.

21

Defendant states that Section VIII-A of the franchise ordinance referred to in plaintiff's petition is invalid in that it attempts to make binding provisions as to rates, which shall suspend the governmental power of the Council which is subject to exertion at any time. Such governmental power of regulation of rates cannot be suspended for any definite and certain period, but the rates fixed are subject to change at any time thereafter, either upon the initiation of the City or upon the application of the company. Said Section VIII-A of said franchise being unilateral is not binding on the defendant for want of mutuality and for the further reason that the City lacks the power to make any binding agreement which shall hold in abeyance governmental power over rates.

[fol. 93] 22

Defendant, on November 3, 1933, filed an instrument in writing styled "Notice and Application of Southern Cities Distributing Company for Change and Modification of Rates, and Application for New Rates to Go Into Immediate Effect;" said Southern Cities Distributing Company also filed on the 7th day of November, 1933, its "Motion for Prompt Hearing and Action" by the Council on account of daily confiscation, and also filed affidavits as exhibits thereto. The Council thereafter met on the 13th day of November, 1933, and brought up the said application and motion, and refused to give the defendant a preliminary hearing, or any other hearing, but passed a resolution or ordinance dated November 13, 1933, prohibiting the Southern Cities Distributing Company from putting into effect,

even pending hearing, the rates specified in its application. Finally on January 23, 1934, the Council ultimately refused any relief whatever, and defendant has filed an appeal with the Railroad Commission of Texas, which is now pending.

23

Defendant here reiterates the allegations contained in its said application and said motion and affidavits attached to plaintiff's petition, and makes them a part hereof by reference without repeating them at this point.

[fol. 94] 24

Defendant, therefore, states that it has done all it could to get temporary relief and final relief before the Council and before the Railroad Commission of Texas, but it has not succeeded in getting any relief whatever, although it has continued, continues and will continue to suffer daily losses amounting to confiscation, and will have no remedy for what it shall have lost before the state legislative procedure is finished.

25

Defendant states that the City is attempting to give force and vitality to said Section VIII-A of its franchise ordinance, and that such attempts on the part of the City are in violation of the law, and that the said section should be cancelled and annulled.

26

Defendant states that Section IX of its franchise ordinance is invalid for reasons hereinabove stated in its answer.

Without giving defendant any notice or hearing, the City Council of Texarkana, Texas, on December 12, 1933, adopted a resolution which ordered and directed defendant to restore in the City of Texarkana, Texas, the rates for gas which were in effect in said city on and prior to the passage and acceptance of the franchise dated June 13, 1930, and which also directed the City Attorney to call upon the company to refund to its consumers the difference between [fol. 95] the amounts collected under the franchise since May 30, 1930, and the rates which the Council found to have been the lawful rates in Texarkana, Arkansas. An appeal from said resolution of said Council has been filed with the

Railroad Commission of Texas, and such appeal is now pending.

27

That the present fair value of defendant's property used and useful in furnishing natural gas to the consumers in the City of Texarkana, Texas, is in excess of $518,252.37. That operating under the schedule of rates set forth in the franchise, the gross revenue derived by this appellant in the operation of its said distribution plant in said City of Texarkana, Texas, for the year 1931 was $306,640.48, while the expenses and charges necessarily incurred in such operation, without any provision for annual depreciation charge, were in the aggregate of $363,140.79, or a difference of $56,500.31; for the year 1932, the revenue was $261,432.54, and the expenses $327,087.46, or a difference of $65,654.92; for the year 1933, the revenue was $242,709.26, and the expenses $313,173.76, or a difference of $70,464.50 if the rates applied for are used for the year 1932 the gross revenue would have been $313,037.29, whereas the expenses were $327,087.46, or a difference of $14,050.17. That the revenues for 1933 applying the rates applied for would be less than the revenues of 1932, whereas the expenses were approximately the same, and defendant believes and, there- [fol. 96] fore, avers that its revenues even under the rates applied for will not be materially increased in 1934 or the very near future, and that its expenses will be increased due to increased prices of material and labor. That appellant for some time past has suffered and is still suffering a daily loss in the operation of its said distribution plant in said city, and unless it is permitted to increase its charges to those applied for as hereinabove stated, it will continue to suffer a daily loss in the operation of its said distribution plant in the said city.

28

That said City of Texarkana, Texas, through its said City Council, claiming to act under authority conferred by the State of Texas, has undertaken and is now undertaking to deprive this appellant of the right to charge such rates, for the services being performed by it in the distribution and sale of gas in said City, sufficient to pay operating expenses and afford it a reasonable return on the fair value of its said property above necessary expenses, and thereby to

confiscate the property of plaintiff and to deprive appellant of its property without due process of law and to deny to plaintiff the equal protection of the laws.

29

That the Fourteenth Amendment of the Constitution of the United States of America provides that no state shall deprive any person of property without due process of law, and guarantees to every person the equal protection of the [fol. 97] laws. That defendant is entitled to the benefit and protection of said constitutional provision, and it now invokes and urges same as against the actions of said City of Texarkana, Texas, and as giving to it the right to increase its charges for the services being rendered in the operation of its gas distributing plant in the City of Texarkana, Texas, in the distribution and sale of gas in said city sufficient to prevent the confiscation of its said property and to earn a reasonable return above its necessary expenses upon the fair value of its property used and useful in rendering such services.

30

Defendant states that the attempts of the city to prevent it from charging the rates applied for, is to impose upon the defendant a daily loss amounting to daily confiscation of its property; that any lower rates will fail to yield revenue sufficient to pay expenses of operation, depreciation, taxes and a reasonable return upon the fair value of its said property. That the attempt of the city to force it to charge less rates than those applied for, if successful, will deprive it of its property to its damage in a sum or value exceeding three thousand dollars ($3,000.00), exclusive of interest and costs, without due process of law, and deny defendant the equal protection of the laws; that under the Fourteenth Amendment to the Constitution of the United States, no state may deprive any person of life, liberty or property without due process of law, nor deny to any per- [fol. 98] son within its jurisdiction the equal protection of the laws; and defendant does now plead and invoke said provision of the United States Constitution for the protection of its property. That the attempts of the city to keep defendant from putting into effect less rates than that

applied for, are violative of these provisions of the United States Constitution, and defendant urges said constitutional provisions as a protection against said efforts of said plaintiff.

Wherefore, defendant prays that the temporary injunction be dissolved and set aside, that the petition of plaintiff be denied, and that Sections VIII-A and IX of the franchise ordinance be declared null and void, and be cancelled, and that defendant recover all costs herein incurred, and for such other and further relief, general and special, in law and in equity, to which it may be entitled.

H. C. Walker, Jr., W. H. Arnold, Jr., Arnold & Arnold, King, Mahaffey, Wheeler & Bryson, Attorneys for Defendant.

[File endorsement omitted.]

[fol. 99] IN UNITED STATES DISTRICT COURT

In Equity. No. 109

[Title omitted]

MOTION OF PLAINTIFF TO STRIKE OUT ANSWER AND COUNTERCLAIM OF SOUTHERN CITIES DISTRIBUTING COMPANY—Filed September 24, 1934

To the Honorable Randolph Bryant, United States District Judge:

Comes the plaintiff and moves to strike out the Answer and Counterclaim of the defendant, Southern Cities Distributing Company and for cause shows the Court:

That the facts set out in said answer and counterclaim, if true, are not sufficient to constitute a defense to plaintiff's bill herein.

Wherefore plaintiff prays that such Answer and Counterclaim be stricken out.

Ed B. Levee, Jr., B. E. Carter, Solicitors for Plaintiff.

[File endorsement omitted.]

[fol. 100] In District Court of the United States

In Equity. No. 106

[Title omitted]

Motion to Record Change of Name of the Defendant, Southern Cities Distributing Company, to Arkansas Louisiana Gas Company—Filed January 18, 1935

To the Honorable Randolph Bryant, United States District Judge:

The Arkansas Louisiana Gas Company, a corporation organized and existing under the laws of the State of Delaware, with its principal office in the City of Dover in the County of Kent, states that an agreement and act of merger between the Southern Cities Distributing Company, Public Utilities Corporation of Arkansas, Arkansas Louisiana Pipeline Company, and Reserve Natural Gas Company of [fol. 101] Louisiana was made on November 27th, 1934, whereby all and singular, the rights, privileges, powers and franchises of the Public Utilities Corporation of Arkansas, Arkansas Louisiana Pipeline Company and Reserve Natural Gas Company of Louisiana, and all of the property, real, personal or mixed, belonging to said corporation, including their respective surpluses and reserves, were vested in the Southern Cities Distributing Company; and pursuant thereto, and thereafter, the articles of incorporation of the Southern Cities Distributing Company were amended so as to change its corporate name to Arkansas Louisiana Gas Company; that the Arkansas Louisiana Gas Company has qualified, and permit has issued to it to do business in the State of Texas according to law.

Wherefore, appearer prays that this Honorable Court enter an order that the name Arkansas Louisiana Gas Company be substituted in all proceedings herein for the Southern Cities Distributing Company and the style of the cause be changed to "City of Texarkana, Texas vs. Arkansas Louisiana Gas Company."

In the United States Circuit Court of Appeals

King, Mahaffey, Wheeler & Bryson, W. H. Arnold, Jr., H. C. Walker, Jr.

Duly sworn to by T. J. Heard. Jurat omitted in printing.

[fol. 102] [File endorsement omitted.]

IN DISTRICT COURT OF THE UNITED STATES

In Equity. No. 106 and No. 109, Consolidated

[Title omitted]

ORDER THAT THE NAME OF ARKANSAS LOUISIANA GAS COMPANY BE SUBSTITUTED AS DEFENDANT, ETC.—Filed January 18, 1935

On this January 18, 1935 defendant Southern Cities Distributing Company files motion to record change of name of [fol. 103] Southern Cities Distributing Company to Arkansas Louisiana Gas Company. Come the parties and defendant Southern Cities Distributing Company presents said motion for action by the court. The court finds the facts as alleged in said motion.

It is therefore by the court considered, ordered, adjudged and decreed that the name of Arkansas Louisiana Gas Company be and the same is hereby substituted in lieu of Southern Cities Distributing Company.

O.K. W. H. Arnold, Jr., for def.
O.K. Ed. B. Levee, Jr.

[File endorsement omitted.]

ORDER OF CONSOLIDATION

Item 14, Order of Consolidation. Do not copy: state:

"The order is that Case No. 106 and Case No. 109 be consolidated; and that plaintiff's motion to strike out the answer and counterclaim of defendant in Case No. 109 In Equity be considered as going to and applying also to defendant's answer and counterclaim in Case No. 106."

[fol. 104] IN UNITED STATES DISTRICT COURT

No. 109, In Equity (With Which Has Been Consolidated Suit No. 106, In Equity, Between the Same Parties)

[Title omitted]

SUPPLEMENTAL BILL OF CITY OF TEXARKANA, TEXAS—Filed December 30, 1936

Comes the plaintiff, the City of Texarkana, Texas, and pursuant to leave heretofore granted by this court on December 18, 1936, files this its Supplemental Bill in this consolidated cause for the purpose of bringing into the record matters and facts arising since the filing of the original bill in both No. 106 and in No. 109 In Equity, and for the purpose of amending its prayers for relief in view of such new matters.

At the time the original bill was filed in No. 109 In Equity, there was pending in the United States District Court for the Western District of Arkansas a suit between the Southern Cities Distributing Company, whose corporate name*d* has since been changed to the Arkansas Louisiana Gas Company and which is the same corporation as the defendant in these suits, and the City of Texarkana, Arkansas, which suit involved the following situation: On October 23, [fol. 105] 1933, said gas company applied to the City Council of the City of Texarkana, Arkansas, for an increase in rates. This application was heard before the City Council of the City of Texarkana, Arkansas in December, 1933, and on December 22, 1933, said City Council denied said application and ordered the gas company not to charge nor collect any greater rates in Texarkana, Arkansas, than those then legally in effect, which rates were the same rates as those described and set out in the franchise contract between said gas company and the City of Texarkana, Texas, of March 13, 1923, a copy of which is attached as Exhibit "A" to the original bills in these suits. In February, 1934, the gas company, being the same company as the defendant in these present suits, filed suit in the United States District Court for the Western District of Arkansas against the City of Texarkana, Arkansas, asking that said rate order should be enjoined, and that it be protected in collecting from the consumers in Texarkana, Arkansas, the higher rates which it had applied for in October, 1933. At the time of the filing

of said suit said gas company applied for and was granted a temporary restraining order, and from February 16, 1934, until December 4, 1936, said gas company collected under said temporary restraining order higher rates than the rates set forth and described in the said franchise contract of March 13, 1923, copy of which is attached as Exhibit "A" to the original bills, and higher rates than those provided in [fol. 106] the franchise of June, 1930, a copy of which is attached as Exhibit "B" to the original bills herein.

On December 4, 1936, the United States District Court for the Western District of Arkansas entered its decree in said suit and dismissed the plaintiff's bill and dissolved the temporary restraining order in so far as said bill and said restraining order affected the rates provided in the order of the Council of Texarkana, Arkansas, made on December 22, 1933, and in said decree the court upheld the validity of the rates described in said order of December 22, 1933, which rates are the same as those described in the franchise between the gas company and the City of Texarkana, Texas, made and agreed to on March 13, 1923, a copy of which franchise is attached as Exhibit "A" to the original bills herein. A copy of this decree of the United States District Court for the Western District of Arkansas, entered on December 4, 1936, is hereto attached as Exhibit No. 1 to this Supplemental Bill and made part hereof.

In said decree of December 4, 1936, said United States District Court for the Western District of Arkansas ordered and directed the gas company to refund to its consumers in Texarkana, Arkansas, all amounts collected under the temporary injunction theretofore granted in said suit over and above the amounts due under the rates which said court found to be legal, same being the same as the rates described and set forth in the franchise for Texarkana, Texas, of [fol. 107] March, 1923, a copy of which is attached as Exhibit "A" to the original bills herein.

Thereafter, on December 16, 1936, the plaintiff gas company in that suit, being the same company as the defendant in this suit, applied to the United States District Court for the Western District of Arkansas for an appeal, for a supersedeas pending said appeal, and for an injunction pending said appeal to protect it in continuing to charge higher rates. On December 16, 1936, said court granted an appeal and granted, conditioned upon the filing of a bond, a supersedeas

pending the appeal from that part of its decree of December 4, 1936, which ordered the gas company to make refunds, but said district court refused to grant an injunction pending the appeal. A copy of said order of December 16, 1936, is hereto attached as Exhibit No. 2 to this Supplemental Bill. The gas company is now furnishing gas to domestic and commercial consumers in Texarkana, Arkansas at the rates which are the same as those described and set forth in the franchise agreement for Texarkana, Texas, of March, 1923, a copy of which is attached as Exhibit "A" to the original bill herein and which rates are much lower than the present rates in Texarkana, Texas, which present rates are the rates contained in the franchise of June, 1930, a copy of which is attached as Exhibit "B" to the original bills.

Plaintiff says that during the period from June, 1930, to December 1, 1933, the gas company collected from its con-
[fol. 108] sumers in Texarkana, Texas, and in Texarkana, Arkansas, the same rates, said rates being those described and set forth in the franchise agreement for Texarkana, Texas, of June, 1930, a copy of which is attached as Exhibit "B" to the original bill. On December 1, 1933, the gas company was ordered and directed to refund to its consumers in Texarkana, Arkansas, all amounts collected from them in excess of the amounts which would have been due under rates which were the same as those set forth and described in the franchise agreement for Texarkana, Texas, of March 13, 1923, a copy of which is attached as Exhibit "A" to the original bills. Said decree was final and thereafter said gas company did refund such excess collections to its consumers in Texarkana, Arkansas, in the amount of approximately $66,000.00. During the period, therefore, from June, 1930, to December 1, 1933, the gas company has received from its consumers in Texarkana, Arkansas, a much smaller rate than it has collected from its consumers in Texarkana, Texas. The City of Texarkana, Texas, has called upon the gas company to make similar refunds for said period to its consumers in Texarkana, Texas, and the defendant gas company, in violation of its franchise agreement, has failed and refused to do so.

During the period from December 1, 1933, to February 16, 1934, the gas company supplied gas to its consumers in Texarkana, Texas, under the rates set forth in the franchise of June, 1930, a copy of which is attached as Exhibit "B"

[fol. 109] to the original bill, and during the same period supplied gas to its consumers in Texarkana, Arkansas, under the lower rates described and set forth in the franchise agreement of March, 1923, a copy of which is attached as Exhibit "A" to the original bill. The City Council of Texarkana, Texas, on December 12, 1933, called upon the gas company to abide by its franchise agreement and to supply gas to its consumers in Texarkana, Texas, at the same rates which it was then using in Texarkana, Arkansas, and said gas company, in violation of its agreement, failed and refused to do so but continued to collect from its consumers in Texarkana, Texas, the much higher rates described and set forth in the franchise agreement of June, 1930, a copy of which is attached as Exhibit "B" to the original bill herein.

During the period from February 16, 1934, to December 4, 1936, the gas company collected from its consumers in Texarkana, Arkansas, higher rates than it actually collected at said time from its consumers in Texarkana, Texas, but it has now been ordered and directed by said Federal Court in Arkansas to refund to its consumers in Texarkana, Arkansas, all amounts collected in excess of the rates described in the franchise agreement of March 13, 1923, a copy of which is attached as Exhibit "A" to the original bill.

Beginning with December 4, 1936, the gas company has been collecting from its consumers in Texarkana, Arkansas, at the rates described in said franchise agreement of March [fol. 110] 13, 1923, but it has continued to collect and is now collecting from its consumers in Texarkana, Texas, the higher rates described in the franchise of June, 1930.

The plaintiff says that it and the consumers of Texarkana, Texas, for whose use and benefit this suit is brought, are entitled to the judgment and decree of this court as follows:

1. Ordering, in the manner hereinafter prayed, an immediate refund of all amounts collected from the defendant's consumers in Texarkana, Texas, during the period from June, 1930, to February 16, 1934, over and above the amounts which would have been due from them under the rates described in said franchise agreement of March 13, 1923.

2. Ordering and directing said defendant gas company to now charge and collect in the City of Texarkana, Texas, no greater rates than those provided in said franchise agree-

ment of March 13, 1923, being the rates put into effect in Texarkana, Arkansas, on December 4, 1936, and ordering a refund in a similar manner of all amounts collected from consumers in Texarkana, Texas, since December 4, 1936, over and above the amounts which would have been due under the rates put into effect in Texarkana, Arkansas, on December 4, 1936.

3. Ordering the defendant gas company to deposit in the registry of this court, or in some depository, designated by this court, all amounts collected from its consumers in Tex- [fol. 111] arkana, Texas, during the period from February 16, 1934, to December 4, 1936, over and above the amounts provided by the rates in said franchise of March 13, 1923; that the same should be held pending the determination of the appeal in the case affecting the rates in Texarkana, Arkansas, and that if the decree of said Arkansas court of December 4, 1936, should be affirmed that said amounts should be thereupon paid to said consumers in Texarkana, Texas, under the further order of the court.

Premises considered, plaintiff, for its own use and benefit and as the representative of and as trustee for all the consumers of gas in the City of Texarkana, Texas, and for use and benefit of all such gas consumers, prays:

1. That the defendant be ordered and directed to comply with Section IX of its franchise agreement of June, 1930, and to place in immediate effect in Texarkana, Texas, the rates for gas which it is now collecting in Texarkana, Arkansas.

2. That the defendant be ordered and directed to file with the Clerk of this court, and to furnish a copy to plaintiff, within thirty days, a statement, verified by the oath of its chief accounting officer, showing as to each consumer in Texarkana, Texas, all monies collected under the rates provided under the franchise of June 13, 1930, from the time such rates were put into effect down to the date of the decree herein, showing as to each consumer his name and address, [fol. 112] the amount collected from each consumer, the amount due from each under the rates provided in the franchise of March 13, 1923, and the difference between the amount so collected and the amount so due; and that said statement should be divided into three periods, one covering

from June 13, 1930, to February 16, 1934, one from February 16, 1934, to December 4, 1936, and one from December 4, 1936, to the date of the decree herein.

3. That the defendant be ordered and directed at the time of filing such statement to pay into the registry of this court the entire amount collected by it from its consumers in Texarkana, Texas, in excess of the amount which should have been collected under the rates provided in the franchise of March 13, 1923, without any offsets, setoffs or counterclaims of any kind whatsoever arising since the filing of these suits, plus all the fees, costs and commissions to which the Clerk may be entitled for paying out such moneys to the persons who may be then entitled to receive the same; that the plaintiff and the consumers be afforded access to the books of the company for the purpose of checking such statement and be allowed a reasonable time within which to call any errors to the attention of the court.

4. That the amount so deposited which represents the excess collections from June, 1930, to February 16, 1934, and from December 4, 1936, to the date of the decree herein, be now paid out by the Clerk to the persons from whom collected after the City has been given a reasonable opportunity to present for the consideration of this court its claims against such amounts on account of assignments [fol. 113] and on account of attorneys' fees and the expenses of this litigation.

5. That the amount of the excess collected during the period from February 16, 1934, to December 4, 1936, be held in the registry of the court pending decision of the appeal in the Texarkana, Arkansas, gas rate case.

6. For judgment for its costs and for all other necessary or proper relief.

Ed B. Levee, Jr., City Attorney. B. E. Carter, Attorneys for Plaintiff.

Exhibit No. 1 to Supplemental Bill

United States District Court, Western District of Arkansas, Texarkana Division

In Equity. No. 219

Arkansas Louisiana Gas Company, Plaintiff

v.

City of Texarkana, Arkansas et al., Defendants

Decree

On this the 4th day of December, 1936, a day of the regular November, 1936, Term of the United States District Court of the Western District of Arkansas, Texarkana Division, this cause comes regularly on to be heard, the court having heretofore considered the evidence taken before the Master herein and the reports heretofore filed by said Master and the exceptions filed by the parties herein to said reports, and having heard the argument of counsel thereon and having considered the additional evidence requested [fol. 114] by the court on such argument and thereafter filed herein, by the plaintiff, and the court having heretofore, on October 31, 1936, filed herein its Memorandum Opinion in this case, and having approved and adopted Findings of Fact and Conclusions of Law found to be in conformity with said opinion, the court now finds:

On October 23, 1933, the plaintiff in this suit, whose corporate name was then the Southern Cities Distributing Company and is now the Arkansas Louisiana Gas Company, filed with the City Council of the City of Texarkana, Arkansas, an application for an increase in rates for the gas distributed by it in said City; that, after hearings, said City Council on December 22, 1933, ordered said plaintiff gas company not to increase its rates and to continue to supply gas to the consumers in the City of Texarkana, Arkansas, at the then existing rates, except for some changes as to industrial rates made at the request of the company and which are not material here; that in said order of December 22, 1933, said Council continued said rate matter for the purpose of considering whether a reduction in the then existing rates should be ordered; that on February 13, 1934, said City Council did order a reduction in rates; that thereupon the plaintiff immediately filed its bill in this suit in which bill it

alleged that said order of December 22, 1933, by refusing to allow it to increase its rates, operated to deprive it of its property without due process of law, that said order of February 13, 1934, also operated to deprive it of its property without due process of law, and that any rates less [fol. 115] than those set forth in its application to the Council of October 23, 1933, were confiscatory and that it was entitled to collect such rates; and in which bill it prayed that the enforcement of said rate order of December 22, 1933, be enjoined, that the enforcement of said order of February 13, 1934, also be enjoined, and that the defendant city and its Mayor and aldermen and the consumers in said city be enjoined and restrained from interfering with the plaintiff in collecting the rates set forth in its application of October 23, 1933; and said plaintiff prayed for a temporary injunction and restraining order to protect it in charging such increased rates so applied for pending a trial and decision in this suit; that on February 16, 1934, this court did make and enter a temporary injunction and restraining order in the terms prayed for in said bill conditioned upon plaintiff furnishing a bond to protect the consumers as to any overcharge of rates and interest thereon that might be adjudged due them, and that, plaintiff having made the bond required by said order of February 16, 1934, and having since furnished the further security subsequently required by the court, has, since February 16, 1934, been charging to and collecting from its consumers in Texarkana, Arkansas, under and by virtue of said temporary injunction and restraining order, the rates for gas set forth and described in its said application of October 23, 1933, which said rates so charged and collected are higher than the rates which the plaintiff was authorized and ordered to charge and collect [fol. 116] under the rate order and resolution of the City Council of December 22, 1933.

The court finds that the rates set out and prescribed in the rate order and resolution passed by the City Council of the City of Texarkana, Arkansas, on December 22, 1933, are and were just and legal rates, that same are not confiscatory and do not deprive plaintiff of its property without due process of law, that said rate order and resolution of December 22, 1933, was and is a valid and legal order and a legal and valid exercise of the rate making power and jurisdiction of said City Council, that plaintiff is not entitled to an injunction as to said rates and that as to such rates the plaintiff's

bill should be dismissed for want of equity and the temporary injunction should be dissolved and that judgment should be entered in the terms of the prayer in defendant's answer against the plaintiff and the sureties on its bonds herein to refund to the consumers in said city all amounts collected from them since February 16, 1934, for gas supplied before or since that date, in excess of the amounts which would have been due for such gas under said Council's order of December 22, 1933, if the enforcement of the same had not been temporarily enjoined, together with interest thereon at the rate of 6% per annum from the date such excess was collected until such refund be made.

The court finds that the rates established by the order of the Council of February 13, 1934, are confiscatory and should be permanently enjoined, and that the invalidity of [fol. 117] said order of February 13, 1934, leaves said rate order of December 22, 1933, in full force and effect.

It is therefore, by the court, considered, ordered, adjudged and decreed:

That the defendants, the City of Texarkana, Arkansas, and its Mayor and Aldermen, be and they hereby are enjoined and restrained from enforcing against the plaintiff the reduced rates set forth in the rate resolution and order passed by the City Council of said City on February 13, 1934; and,

That the temporary restraining order issued herein on February 16, 1934, be dissolved, set aside and annulled in so far as it restrains the enforcement of the resolution and rate order of the City Council passed on December 22, 1933, and in so far as it protects plaintiff in charging and collecting any other or higher rates than those set forth in said order and resolution of December 22, 1933; and that plaintiff's bill be dismissed for want of equity in so far as it alleges that the rates set forth in said order of December 22, 1933, are invalid for any reason and in so far as it seeks to enjoin the enforcement of said order or seeks to protect plaintiff in charging any other or higher rates than those directed therein; and,

That the plaintiff and the sureties upon its bonds heretofore filed herein be and they hereby are ordered and directed, in the manner and upon the terms herein set out, to refund to the persons from whom it has collected for gas sold in [fol. 118] the City of Texarkana, Arkansas, either before or after February 16, 1934, all amounts collected since Feb-

ruary 16, 1934, in excess of the amounts which were due from each of such consumers for such gas at the rates and upon the terms provided in the resolution and order of the Council passed on December 22, 1933, together with interest on such excess amounts from the date of payment of same to the date of such refund at the rate of 6% per annum. Said refunds shall be made in the following manner:

1. The plaintiff is ordered to file in this court, and to furnish a copy to the defendants, within thirty days from this date, a statement, duly verified by the oath of its chief accounting officer, showing the names of each and all the consumers from whom it has collected, for gas sold in the City of Texarkana, Arkansas, any amounts in excess of the amounts due from each such consumer under the rates prescribed in said resolution of December 22, 1933, and that said statement show as to each such consumer the amount collected and the amount which should have been collected under such resolution and the date of each such collection, the amount of the total excess collected and the interest due thereon from the date of collection.

2. That the plaintiff make available to the defendants in the City of Texarkana, Arkansas, its books and records showing the gas consumed by each consumer each month and the amounts collected therefor, and that defendants [fol. 119] be permitted to check said statement of refunds and interest thereon.

3. That plaintiff not make any refunds to any consumer until the further order of the court respecting expenses of the city and attorneys' fees, and that plaintiff be not permitted to set off against the refunds due any consumer, in so far as costs, expenses and attorneys' fees are concerned, any amounts falling due to plaintiff or incurred after November 1, 1936.

4. That defendants have and recover from plaintiff all their costs in and about this suit expended.

5. That the court retain jurisdiction of this cause for the purpose of passing upon the question of attorneys' fees and expenses of the city in connection with this suit.

Plaintiff excepts to each of the findings and orders of the court.

(Signed) Heartsill Ragon, Judge.

Entered Dec. 4, 1936.

EXHIBIT No. 2 TO SUPPLEMENTAL BILL

IN THE UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF ARKANSAS, TEXARKANA DIVISION

Equity. No. 219

ARKANSAS LOUISIANA GAS COMPANY, Plaintiff,

vs.

CITY OF TEXARKANA, ARKANSAS et al., Defendants

ORDER

The plaintiff, Arkansas Louisiana Gas Company, having duly filed its petition for appeal from the decree in the above [fol. 120] entitled cause to the United States Circuit Court of Appeals for the Eighth Circuit, together with an assignment of errors, and having filed a motion for an order to be made fixing the amount of security which plaintiff should give and furnish upon said appeal, and having petitioned that upon giving of said security all further proceedings of this court be suspended and stayed and that the temporary injunction heretofore granted be continued in effect until the final determination of said appeal, and the defendants having filed herein their response to said application for an injunction pending said appeal; the court finds that said appeal should be granted but that plaintiff is not entitled to an injunction pending its appeal.

The court further finds that the plaintiff has heretofore filed bonds herein to the extent of $75,000.00, and that order to supersede the orders and judgment of this court that refunds are due the consumers, additional security in the sum of $50,000.00 is necessary.

It is therefore by the court ordered that the Arkansas Louisiana Gas Company, plaintiff in the above entitled cause, be and it is hereby granted an appeal from the final decree in this cause to the United States Circuit Court of Appeals for the Eighth Circuit.

That upon said plaintiff, Arkansas Louisiana Gas Company filing with the Clerk of this court a good and sufficient bond in the sum of $50,000.00, to the effect that if the said plaintiff shall prosecute said appeal to effect and answer [fol. 121] all damages and costs and shall make all refunds which may be due if it fails to make its plea good, then the

said obligation to be void, otherwise to be and remain in full force and effect, the said bond to be approved by the court, that all further proceedings in this court adjudging refunds to be due to the consumers, be, and they hereby are suspended and stayed until the final determination of said appeal. Said bond shall be in addition to the security of the bonds heretofore filed in this cause by the plaintiff, and this order shall not operate to release the plaintiff nor the sureties upon said former bonds from their liability under said bonds in the event the final decree herein is affirmed.

This 16th day of December, 1936.

(Signed) Heartsill Ragon, United States District Judge.

[File endorsement omitted.]

[fol. 122] In United States District Court

Consolidated Cases Nos. 106 and 109, in Equity

[Title omitted]

Separate Amended Answer of Defendant, Arkansas Louisiana Gas Company, to Plaintiff's Original and Supplemental Petition, and Counterclaim of Arkansas Louisiana Gas Company—Filed July 14, 1937

To the Honorable Judge of said Court:

Comes Arkansas Louisiana Gas Company and with leave of the Court first had and obtained, files this its Separate Amended Answer to Plaintiff's Original and Supplemental Petition and its Counterclaim, and asks that it be considered as an addition to defendant's pleadings in Cases Nos. 106 and 109; and shows the Court:

This defendant admits that the City of Texarkana, Texas is a municipal corporation chartered and incorporated under and by virtue of the laws of the State of Texas; that defendant is a corporation doing business in said City and owning the gas distribution plant therein.

[fol. 123] I

Defendant admits that the City of Texarkana, Texas is a municipal corporation; it was incorporated under special

charter, not by Act passed November 2, 1905, but by special Act of Legislature approved May 2, 1907, effective 90 days thereafter. Said Act defines and limits its powers. Said Act is pleaded and reference is made to its terms for certainty. Said City was not incorporated under the general laws of the State.

Southern Cities Distributing Company was the name of the defendant at the time the suit was filed. However, as shown by motion and order of this Court, the name of said defendant has been changed to Arkansas Louisiana Gas Company. Said corporation owns and operates the natural gas distributing plant in the City of Texarkana, Texas.

Defendant admits that on March 13, 1923 an ordinance of the City of Texarkana, Texas was passed; but states it was an amendment to the original gas franchise granted in the year 1905 and expiring in the year 1930. It was in 1923 owned by Southwestern Gas & Electric Company, then the owner of the gas plant in said City. The only effect of the ordinance of March 13, 1923 was to change and prescribe a certain schedule of rates for gas. Defendant denies that the ordinance had any effect other than to prescribe rates; the terms thereof are referred to for further certainty. Said ordinance of March 13, 1923 and gas franchise are admitted to have been in 1928 assigned to defendant. However, they [fol. 124] both expired by their terms and were replaced and completely superseded by an ordinance of June 13, 1930 which granted a new 25-year franchise to defendant in the City of Texarkana, Texas; Section V thereof prescribed the rates to be charged. Defendant admits said franchise was accepted by it, but denies that it agreed to carry out all of the terms of said ordinance, and especially denies being bound by Section IX thereof, or by Section VIII-A thereof, and denies it is estopped from questioning any of its terms or conditions, and especially as to seeking an increase in rates to meet developing conditions.

Defendant admits that in 1930 it applied to the City Council of Texarkana, Texas for increase in gas rates; after hearing the city council rejected the application; defendant appealed to the Texas Railroad Commission; said commission came to Texarkana, Texas and conducted hearings on said application on May 28th and 29th, 1930. Defendant denies that, while the hearings were going on and while testimony was being taken before the Commission, defendant proposed to the city council a compromise of said rate con-

troversy. Defendant denies that no findings were made and no order was entered by the Commission; denies that the ordinance passed by the council was in the nature of a franchise agreement insofar as the rate provisions were concerned; defendant states that Section V prescribing the rates was in pursuance of the power of the city council over rates.

[fol. 125] Defendant states that the ordinance and the action of the defendant with reference thereto are in writing as shown by the petition and speak for themselves, reference being made to the writings for certainty as to contents. Defendant states that on the application of 1930, hearings were had and voluminous testimony and exhibits were introduced in the council and that the ordinance itself so records it. When appeal was taken by defendant to the Railroad Commission of Texas in 1930 from the refusal of the city council, there were full hearings and voluminous testimony and exhibits introduced before the Commission. While the hearings before the Railroad Commission were in progress, a new schedule of rates was proposed by plaintiff. Whereupon proceedings were reopened in the city council; new rates were prescribed; a new franchise was granted by ordinance dated June 13, 1930. The Railroad Commission approved the new rates prescribed by the city council and dismissed the appeal then pending before it.

The rates prescribed by the city council in Section V of the ordinance of June 13, 1930 were put into effect and have been charged at all times since. Said rates set forth in Section V of the ordinance of June 13, 1930 read in part as follows:

Section V. A hearing as to the rates which shall be charged by the Grantee having been had, and the Grantee having waived any right to notice of the fixing of such rates, [fol. 126] the rates to be charged by the Grantee for natural gas furnished under the provisions of this Ordinance are hereby determined and fixed by compromise agreement, said rates are as follows, to-wit:

Domestic and Commercial Rate

(a) For the first one thousand (1000) cubic feet per meter of gas or fraction thereof sold to any domestic or commercial consumer during any one month—$1.00 per thou-

sand cubic feet. Said charge shall also be made regardless of whether any gas is consumed or not.

(b) For the next one hundred and forty-nine thousand (149,000) cubic feet of gas or fraction thereof sold to any domestic or commercial consumer during any one calendar month—$.50 per thousand cubic feet. All gas sold at $.50 per thousand cubic feet is subject to 5% discount if paid within ten (10) days after bill is rendered.

(c) For all gas sold to any one domestic or commercial consumer during any one calendar month in excess of one hundred fifty thousand (150,000) cubic feet—$.25 per thousand cubic feet. All gas sold at $25 per thousand cubic feet is subject to $.02 per thousand cubic feet discount if paid within ten days after bill is rendered.

A charge of $1.00 shall be made for each connect or disconnect, after first installation, that is made for the same consumer, at the same address, except where meter is removed to be replaced, repaired or for inspection.

[fol. 127] Churches, schools or colleges maintained by State, County or City; schools or colleges maintained by any religious organizations; public hospitals, shall be allowed a gross discount of 40% from the gross rate for domestic and commercial gas when bills are paid within ten days after being rendered. Municipal buildings shall be allowed free gas for all gas used in conducting the city's business.

Defendant admits that the franchise ordinance of June 13, 1930 is a binding contract as pertains to the franchise. However, the rate provisions of Section V derive their force, not from the contract, but from the exertion of regulatory power; Section VIII-A and Section IX dealing with rates are invalid and not binding as contracts; they are in conflict with the provisions of the city charter, laws and Constitution of the State of Texas regarding the regulatory power, and are inapplicable to the case at bar. Defendant denies that it is estopped from questioning the validity of Sections VIII-A and IX of said ordinance, or the application thereof.

Defendant admits that the ordinance of June 13, 1930 has not been amended, modified or repealed, except that by the procedure adopted defendant is entitled to increase them. Defendant denies that no attempt has been made to amend,

modify or repeal said ordinance; defendant has attempted to amend and change the rates and is entitled to charge the rates filed in the city council on November 3, 1933.

[fol. 128] Defendant admits that on November 3, 1933 it filed with the city council Notice and Application for Change and Modification of Rates, giving the scale of rates, copy of which is attached as Exhibit "C" to plaintiff's petition. Defendant denies that its notice and efforts to place into effect the rates proposed and filed by it were in violation of any valid or applicable provision of the franchise, but avers that the procedure was in accordance with the laws and Constitution of Texas and with the rights of defendant. In this connection defendant calls attention to the statement and admission of plaintiff that the question raised by plaintiff as to non-compliance with Section VIII-A has now become moot.

Defendant admits that on November 4, 1933 it filed with the City Secretary the instrument in writing quoted in plaintiff's petition.

Defendant admits that the city council on November 14, 1933 passed a resolution, the contents of which will appear by reference to its terms.

Defendant admits that the council had a full hearing on January 22nd and 23rd, 1934, and considered the evidence presented by plaintiff and defendant and passed a resolution on the latter day denying the application for increase in rates, all of which will appear by reference to the terms of said resolution.

Defendant admits that it thereupon appealed to the Railroad Commission of Texas from said order of the city council denying defendant's application and asked that the Railroad Commission establish and fix the rates sought by de-

[fol. 129] fendant. Defendant denies that such appeal was in violation of any valid provision of the ordinance of June 13, 1930.

Defendant denies that on March 12, 1934 the Railroad Commission of Texas made an order allowing said appeal on condition that the company give bond in the sum of ten thousand ($10,000.00) dollars; denies that the Railroad Commission ordered that the action of the city council of January 23, 1934 be suspended or superseded on the filing and approval of such bond. The bond required by the Commission related to an altogether different resolution; to the resolution of December 12, 1933 which as admitted by plain-

tiff was not a rate-reducing order and of which the Railroad Commission had no jurisdiction. The Railroad Commission did have jurisdiction of the appeal from the order of January 23, 1934, but the Railroad Commission refused and still refuses to take any action on said appeal. Defendant is without any other administrative remedy and is entitled to call upon the Court in this case as well as in Case No. 106.

Defendant denies that Section VIII-A of the ordinance of June 13, 1930 constitutes a valid and binding waiver by defendant of any right it may have under the statutes of the State of Texas to seek and secure an increase in rates; denies that Section VIII-A is valid; denies that it is necessary to give one-year's notice before an increase in rates should be applied for; denies that the attempt to secure an increase in rates by appeal to the Railroad Commission is in violation [fol. 130] of any valid provision of the ordinance of June 13, 1930; denies that defendant waived its right to secure increased rates, except one-year's notice of its intention to apply for same; denies that the Railroad Commission is without jurisdiction of the appeal from the order of January 23, 1934; denies that the Railroad Commission is without power over said appeal. Defendant admits that the rates prescribed in the ordinance of June 13, 1930 are and were the only legal and lawful rates chargeable in Texarkana, Texas until November 23, 1933, at which time defendant alleges it had the right to charge increased rates by virtue of the administrative proceedings and by virtue of the prescribed rates or any less rates than applied for being confiscatory. Defendant denies that, if there is a contract as to rates, the Railroad Commission is without power to relieve defendant from such contract. Defendant denies that plaintiff is entitled to an injunction restraining defendant from proceeding with said appeal, or restraining those defendants who are members of the Railroad Commission from entertaining said appeal and from taking any action thereon and from taking any action with reference to the gas rates in the City of Texarkana, Texas; denies that plaintiff is entitled to such injunction at any time or until plaintiff has complied with the provisions of the ordinance of June 13, 1930 in reference to one-year's notice. If material, defendant shows to the Court that it properly gave the one-year's notice quoted in plaintiff's petition and in this an- [fol. 131] swer, infra; but such notice was not a validation of Section VIII-A of the ordinance of June 13, 1930 or waiver

of any defendant's rights; nor did it have the effect to change the laws and Constitution of the State of Texas and of the special charter of the City of Texarkana, Texas with reference to rates. Defendant makes further allegations with reference to Section VIII-A of the ordinance of June 13, 1930, infra.

II

Defendant denies that the statutes of the State of Texas confer upon plaintiff, as representative of gas consumers, the right to make contracts for rates at which gas should be distributed; or contract as alleged by plaintiff.

Defendant denies that under such alleged powers plaintiff entered into a contract with Southwestern Gas & Electric Company dated March 13, 1923. An ordinance increasing rates was passed upon said date but it was not a contract as to rates; nor was it a franchise. Said ordinance of March 13, 1923 and the franchise existing at that time have expired by their terms and have been completely superseded by the ordinance of June 13, 1930. Article E was invalid and has expired and been superseded. Defendant denies that Article E was ever agreed to by defendant; denies it is now in force or valid or binding as a contract. If it were material, it would be invalid for the same reasons shown infra in relation to Section IX. Defendant denies that any alleged franchise of 1923 was transferred by said Southwestern Gas & Electric Company to defendant.

[fol. 132] Defendant admits that the ordinance of June 13, 1930 was accepted by the written instrument quoted in petition of plaintiff, and admits that it contained the following provision:

"Section IX. If Grantee shall be finally compelled to, or should voluntarily, place in any rates in the city of Texarkana, Arkansas less than the rates granted by this Ordinance, then and thereupon the lessened rate shall apply in the city of Texarkana, Texas, and Grantee shall not be authorized or permitted to charge and collect any higher rate."

Defendant denies that said Section IX is in force or valid or binding as contract or applicable; denies that it is a binding contract on the part of the plaintiff, or on the part of defendant; denies that said provision is a just and proper provision to prevent alleged discrimination against the gas consumers

in Texarkana, Texas, or for any other purpose; denies that defendant's acceptance of the ordinance amounted to an acceptance or contract as to Section IX thereof; if it should be so construed, it would be conditioned upon the legality of same and the conditions which would authorize a change; denies that defendant agreed to Section IX as a compromise agreement to secure the granting of increased rates which were granted at the time.

Defendant denies that the City of Texarkana, Texas, and the City of Texarkana, Arkansas, are one community; but [fol. 133] admits that they are in fact separated by state line —one city being in the State of Texas and the other being in the State of Arkansas; the laws applicable to each city are materially different in many respects; defendant denies that consumers of Texarkana, Arkansas, are served from the same mains as consumers of Texarkana, Texas. The gas which is furnished said cities is delivered from pipe line system owned, formerly by Arkansas Louisiana Pipeline Company but, now owned by the defendant. Defendant denies "said provision does not waive any of the rate regulating powers conferred upon the city council by the statutes of the State of Texas." Defendant states that said provision is invalid because in conflict with the special charter of Texarkana, Texas, and with the laws and Constitution of the State of Texas. Defendant denies that said action is a just and proper provision to prevent discrimination against consumers in Texarkana, Texas; nor can it be sustained on such ground; defendant denies there has been any unlawful discrimination. Defendant denies that either of said provisions were within the corporate powers of defendant. Defendant denies that it proposed such agreement; states it was initiated and inserted by the city council.

Defendant denies that an alleged similar compromise agreement was entered into between defendant and the City of Texarkana, Arkansas; denies that referendum petitions against said alleged compromise agreement were at once circulated at Texarkana, Arkansas; denies that they were [fol. 134] given a great deal of publicity in the newspapers; denies that the alleged circulation and publicity took place prior to the action of the City Council of Texarkana, Texas, on June 13, 1930 in passing the ordinance of said date; denies that it was then contemplated by both parties that said alleged compromise agreement in Arkansas might be upset by said alleged referendum petition; denies that said

petitions had any bearing on or reference to the city of Texarkana, Texas; defendant denies that Section IX was designed to take care of the situation in the event said alleged compromise agreement should be upset in Texarkana, Arkansas. There was no change in rates in Texarkana, Arkansas legally after May 8, 1923; the rates prescribed on May 8, 1923 by the City Council of Texarkana, Arkansas were the only lawful or legal rates in said city of Texarkana, Arkansas.

When the ordinance of June 13, 1930 was passed and approved by the City Council of Texarkana, Texas, there had already been passed a Resolution of May 30, 1930 by the City Council of Texarkana, Arkansas as to a similar scale of rates.

As Section IX was then construed and acted upon, it was not contemplated that any rates which had in the past been prescribed by the City Council of Texarkana, Arkansas should be brought forward to govern and control future charges which defendant could collect as applicable rates to its distribution and sale of natural gas in said City of Texarkana, Texas. Following said action, first by the City Council of the City of Texarkana, Texas in prescribing rates [fol. 135] in Section V of the ordinance of June 13, 1930, a number of voters all of whom were of the City of Texarkana, Arkansas, under a referendum amendment of the State of Arkansas, petitioned said City of Texarkana, Arkansas, to submit to the voters of said City at an election the question of approval or disapproval by said voters of the action of said City Council of Texarkana, Arkansas, in passing the Resolution of May 30, 1930 in said City. The city council refused said petition, but later on the petition was sustained by mandamus and an election was held. Said voters had an interest to serve in the result of the election in that it was to their pecuniary advantage to keep the rates to be charged them for natural gas down to the lowest figure possible, and as a result of said election, the said action of said City Council of Texarkana, Arkansas was revoked and it was held in the federal courts in Arkansas that the rates which had been fixed by action of said City Council of Texarkana, Arkansas on May 8, 1923 were continued in effect to prevail until changed by further appropriate action; said 1923 rate in Texarkana, Arkansas was less than the rates prescribed in the June 13, 1930 ordinance of Texarkana, Texas.

It is these rates prescribed by the City Council of Texarkana, Arkansas on May 8, 1923 which the said City Council of the City of Texarkana, Texas, is seeking to have applied in the City of Texarkana, Texas, under and by virtue of its construction of said Section IX. The method so used to bring [fol. 136] about a reduction of the rates in Texarkana, Texas is contrary to and in violation of the authority delegated by the legislature of the State of Texas to the City of Texarkana, Texas, with reference to determining rates, as is apparent from the provisions of the charter of said city constituting such delegated powers, which will be hereinafter copied in this pleading. Such method was not within the contemplation of either the City Council of the City of Texarkana, Texas, or of defendant at the time of the adoption of said franchise ordinance of June 13, 1930. As is apparent from the facts and circumstances herein alleged and the law herein referred to, the method so used to procure a continuation of the rates of May 8, 1923, in the City of Texarkana, Arkansas, is wholly illegal as applied to rates in the City of Texarkana, Texas, and unenforceable as against this defendant.

As a result of the existing rates under said ordinance of June 13, 1930, and the refusal of the said City of Texarkana, Texas to increase such rates, this defendant is suffering a daily loss and will continue to suffer such loss unless and until the rates which it may charge have been increased. If defendant should be compelled to apply any lower rate than that fixed by said ordinance of June 13, 1930, the daily and annual loss will be proportionately increased as the rate is lowered, and defendant will continue to suffer such loss unless and until the rates which it may charge have been increased. That as a result of the imposition upon it of said [fol. 137] rates, defendant's property used and useful in the City of Texarkana, Texas, for the sale and distribution of natural gas has to a considerable extent been confiscated, and is being confiscated and unless the rates which it may charge shall be increased, it will soon suffer complete confiscation, and will thereby sustain an irreparable loss and injury. That under the circumstances the defendant is entitled to increase its rates in the supply and sale of natural gas in said City of Texarkana, Texas to a sufficient amount to afford it a reasonable return upon the fair value of its said property, and under the laws of the State of Texas and the charter of said City of Texarkana, Texas is entitled to

at least eight per cent, if not ten per cent, return on the fair value of its said property; and under the circumstances is entitled to prevent the said City of Texarkana, Texas, acting through its said City Council, composed of its Mayor and Board of Aldermen, from enforcing the rates which it has been and is now imposing upon this defendant, and which it seeks to impose upon this defendant, and from interfering with the rate which may be put in force by this defendant, provided such rate is found, as alleged, not to give it a return on the fair value of its property.

That the actions complained of by the said City Council of Texarkana, Texas are contrary to the Constitution and laws of the State of Texas, and to its city charter, by the terms of which it derives its power and authority to fix rates for the distribution and sale of natural gas within the limits of said City. That the sole and only power and au- [fol. 138] thority of said City and its said city council to fix rates is to be found in the sections of its said city charter quoted below and in the statutes of the State of Texas.

That the power and authority of said City of Texarkana, Texas and its city council to grant franchises and fix rates is coupled with the unconditional requirement that it must be by ordinance, and that it must contain all the terms and agreements between the parties thereto, and which means the ordinance cannot have incorporated in it some indefinite provision to perhaps become definite when and if certain contingencies arise and when and if something may be done by some other tribunal or court, or which may result from some election in some other jurisdiction.

That the power and authority of said City of Texarkana, Texas, and its City Council to grant franchises and fix rates is coupled with the unconditional requirement that it must be by ordinance, and that the rates granted and fixed must be sufficient to yield at least ten per cent net on the actual cost of the physical properties, equipment and betterments being used and useful in said City in performing the services undertaken by the use of such property (Section 196). The exercise of such power and authority is also coupled with the condition imposed by the statute of Texas which requires that the rate fixed be sufficient to yield such returns on the fair value of such property.

That as is apparent from the facts and circumstances herein alleged, and the law referred to, including the pro- [fol. 139] visions of the charter of said City of Texarkana,

Texas, said city acting through its said City Council, is imposing upon this defendant continuous substantial loss in operating its properties in said City in the distribution and sale of natural gas, and which has resulted in considerable confiscation, and is resulting in considerable confiscation of its said properties to its great irreparable injury and loss; and that said City and its said city council is doing so without authority of law, but in violation of the express provisions of the Constitution and laws of Texas and of the provisions of the said charter of said City; and also in violation of that portion of the Constitution of the United States commonly known and referred to as the Fourteenth Amendment, wherein it provides that no person shall be deprived of his property without due process of law.

The defendant expressly pleads and urges the Constitution and laws of Texas referred to and the provisions of the charter of said City herein copied, and the provisions of the Constitution of the United States herein referred to against all of the said actions taken by said City of Texarkana, Texas, and its said city council, and in protection of its rights and especially in protection of its property against confiscation.

Defendant states that the decree of December 1, 1933 in the District Court of the United States for the Western District of Arkansas resulted from a suit by defendant in Texarkana, Arkansas to increase its rates in said city and was [fol. 140] to the effect that the rates in Texarkana, Arkansas had never been lawfully changed since May 8, 1923 and that the administrative remedy had not been properly exhausted to entitle defendant to have a hearing in court on the merits. Said decree did not and could not, as a court, fix rates, but held that the rates passed on May 8, 1923 by the City Council of Texarkana, Arkansas, by force of the referendum election in that City and by reason of not exhausting the administrative remedy, were continued in force and remained valid and unchanged for all purposes, and that defendant was not at that time entitled to an injunction to increase rates in Texarkana, Arkansas.

Defendant admits that it had refused to place the Arkansas rates of May 8, 1923 into effect in Texarkana, Texas: admits that it has charged in Texarkana, Texas exclusively the rates prescribed by the City Council of Texarkana, Texas in Section V of the ordinance of June 13, 1930 since

it went into effect. Defendant denies that it is unlawfully discriminating against the consumers of Texarkana, Texas, and denies there has been any legal or lawful change in the rates in Texarkana, Arkansas since May 8, 1923.

Defendant denies that gas consumers in the City of Texarkana, Texas are entitled to an order directing defendant to at once place into effect in the City of Texarkana, Texas, lower rates provided in the superseded and terminated alleged franchise of March 13, 1923; denies that the consumers are entitled to refunds. Defendant states that the decree in the Arkansas Federal Court held that the only [fol. 141] lawful gas rates in Texarkana, Arkansas were those prescribed in an ordinance of May 8, 1923 passed by the City Council of Texarkana, Arkansas and that administrative remedy had not been properly exhausted to change them. Defendant hereinafter fully sets forth its position in regard to Sections VIII-A and IX of the ordinance of June 13, 1930.

Defendant being without sufficient information to form a belief denies that plaintiff has received from numerous gas consumers in the City of Texarkana, Texas assignments to plaintiff of part of such alleged refunds; denies that defendant is deprived of any right of offset on or after the filing of plaintiff's petition or at any other time.

Defendant denies that plaintiff and the gas consumers are without any adequate remedies at law. Defendant admits that if it were able to do so, it would prosecute its appeal before the Railroad Commission of Texas, and secure the rates it applied for. Defendant states that the members of the Railroad Commission will not proceed with the hearing of defendant's appeal. Defendant denies that plaintiff will be damaged in any sum.

1. Defendant denies that plaintiff is entitled to any order of this Court; denies that plaintiff is entitled to any injunction; or to an injunction restraining defendant from putting into effect an increase in rates in the City of Texarkana, Texas, except after having given one-year's notice, [fol. 142] or restraining defendant from putting into effect increased rates at any time or in any manner except at the time and in the manner which plaintiff alleges is provided in the franchise ordinance; denies that plaintiff is entitled to an order restraining defendant from prosecuting and from taking any further steps on the appeal which has been

lodged with the Railroad Commission of Texas; denies that plaintiff is entitled to an injunction against the Railroad Commission of Texas.

2. Defendant denies that this defendant should be ordered to comply with Section IX of the ordinance or with plaintiff's construction thereof, or at once or at any other time to place in effect in the City of Texarkana, Texas, the rates for gas in effect in the City of Texarkana, Arkansas; denies that the Court should require bond from this defendant.

3. Defendant denies that it should be ordered to file with the Clerk of the Court statement of moneys collected or statement as alleged in the third section of plaintiff's prayer; or to pay any amount into the registry of the Court; denies plaintiff is entitled to any of the relief sought.

III

In additional answer to plaintiff's supplemental bill, defendant states:

That from the last of June, 1930 to December 1, 1933 defendant collected in Texarkana, Texas only the rates prescribed by the City Council of Texarkana, Texas in Section V of the ordinance of June 13, 1930; and from December [fol. 143] 1, 1933 to date defendant has collected in Texarkana, Texas only the rates prescribed in said Section V. Defendant denies that it has failed to follow said Section V; but states it has followed and applied Section V completely and exclusively. On the other hand, defendant in Texarkana, Arkansas in the period from the last of June, 1930 to December 1, 1933, in view of what was done, collected in Texarkana, Arkansas only the rates that were prescribed by the City Council of Texarkana, Arkansas, and that were enacted by the City Council of Texarkana, Arkansas on May 8, 1923 and that were held to be the only legal and lawful rates in said City, copy of said ordinance being hereto attached and marked Exhibit "B," and made part hereof by reference.

Defendant denies that during the period from December 1, 1933 to February 16, 1934, or at any other period, it has supplied gas to its consumers in Texarkana, Arkansas under the rates described and set forth in the asserted franchise agreement of March, 1923, copy of which is attached as Exhibit "A" to plaintiff's original bill. The

rates collected in Texarkana, Arkansas in the period December 1, 1933 to February 16, 1934 were those prescribed for said city by the City Council of Texarkana, Arkansas as enacted in said ordinance of said City Council of Texarkana, Arkansas. No one has ever enforced or attempted to enforce collection of Texas rates in Arkansas.

Defendant states that that part of the Arkansas decree of December 4, 1936 adjudging recovery by the consumers [fol. 144] in Texarkana, Arkansas for the period of February 16, 1934 to December 4, 1936 was and now remains superseded and suspended by appeal and supersedeas bonds. The rates collected in Texarkana, Arkansas during said period are described infra; see Section IV hereof, sub-division A, paragraph (2) (y).

Defendant denies that beginning with December 4, 1936 it has been collecting from its consumers in Texarkana, Arkansas at the rates described in the asserted franchise of March 13, 1923 of Texarkana, Texas; states that in said period it collected in Texarkana, Arkansas the rates prescribed by the City Council of Texarkana, Arkansas originally enacted by said City Council of Texarkana, Arkansas in 1923. Defendant admits that during said period in Texarkana, Texas defendant has collected only the rates prescribed in Section V of the ordinance of June 13, 1930 enacted by the City Council of Texarkana, Texas.

1. Defendant denies that plaintiff is entitled to a decree ordering any refund from defendant on account of amounts collected in Texarkana, Texas during the period from June, 1930 to February 16, 1934; defendant collected during said period only the prescribed rates.

2. Defendant denies plaintiff is entitled to a decree ordering defendant to now charge and collect in the City of Texarkana, Texas no greater rates than those provided in a previous asserted franchise of March 13, 1923 which was superseded by the ordinance of June 13, 1930 and no longer [fol. 145] effective or operative. Defendant alleges that said ordinances speak for themselves. Defendant denies that the Texas rates of March 13, 1923 were put into effect in Texarkana, Arkansas on December 4, 1936 or at any other time. Defendant denies plaintiff is entitled to an order of refund in a similar manner, or in any manner, of any amount or amounts collected from consumers in Tex-

arkana, Texas since December 4, 1936 over and above the amounts which would have been due under the Arkansas rates which were held to be effective in Texarkana, Arkansas on December 4, 1936, but which holding is under appeal perfected in the last few days.

3. Defendant denies plaintiff is entitled to an order that defendant deposit any amounts for the period from February 16, 1934 to December 4, 1936; denies that if the decree of December 4, 1936 of the Arkansas court should be affirmed, any amounts should be paid to consumers in Texarkana, Texas.

Defendant denies that plaintiff in any capacity is entitled to:

(1) An order that defendant comply with Section IX of the ordinance of June 1930 nor with plaintiff's construction thereof; nor to an order that defendant

"place in effect in Texarkana, Texas the rates for gas which it is now collecting in Texarkana, Arkansas."

Moreover said rates are still under contest and appealed. The decision of the lower court is subject to reversal.

[fol. 146] (2) Defendant denies plaintiff is entitled to an order that defendant file any statement, or a statement showing as to each consumer the moneys collected under the prescribed rates of the ordinance of June 13, 1930 for any period, nor showing the amounts that would have beeen due if previous or superseded rates, or Arkansas rates had applied; denies that defendant should furnish statement as to any period or as to the period from June 13, 1930 to February 16, 1934, nor as to the period from February 16, 1934 to December 4, 1936, nor as to the period from December 4, 1936 to date of decree herein.

(3) Defendant denies it should be ordered to pay any amounts into the registry of the Court collected under the prescribed rates in excess of what would have been collected if the asserted rates of March 13, 1930, or other rates had been the prescribed rates; denies that offsets, set-offs and counterclaims, be disregarded; denies defendant should pay fees, costs, or commissions; denies plaintiff and the consum-

ers be afforded access to defendant's books for such purposes.

(4) Defendant denies that any amounts should be deposited or paid out for any period or for the period from June 1930 to February 16, 1934, or for the period from December 4, 1936 to date of decree herein.

(5) Defendant denies that the alleged amount of alleged excess collected from February 16, 1934 to December 4, 1936 be paid into the registry of the court, or be paid by defendant in any manner.

[fol. 147] Section IX, if it should be held to be valid and binding at all, or capable of application, should be limited to such period that should be held applicable, if any. Defendant says no such time has arrived, but if it should be held to be so, no retroactive effect should be applied. Nor could the period go back of December 1, 1933 nor extend later than February 16, 1934, or longer than two and one-half months. Section IX cannot by its terms have any retroactive effect; nor can it have effect in the future nor as to periods in contest.

The decree of December 1, 1933 in the United States District Court for the Western District of Arkansas established that the rate in Texarkana, Arkansas passed in 1930 was never a legal or lawful rate and ordered defendant to charge only the legal or lawful rates until lawfully changed. This did not amount to a lowering of the rates as they were never legally changed. However, these legal rates were less than the rates prescribed in Section V of the ordinance of June 13, 1930, which were the only rates charged in Texarkana, Texas. On February 16, 1934 a temporary injunction rate in Texarkana, Arkansas, higher than the Section V rates in Texarkana, Texas was put into effect, by order of the United States District Court for the Western District of Arkansas in Cause No. 219 in Equity. Decree was rendered by said court making the injunction permanent in part only and as modified, was appealed from, as shown infra.

Said injunction of February 16, 1934 is still effective in part, having been modified on December 4, 1936. Defend-[fol. 148] ant is resisting with all its power the modified or unfavorable parts of said decree and is insisting on its right to the full relief prayed, as originally granted in the tem-

porary injunction. Such cause pending in the United States District Court for the Western District of Arkansas, No. 219 in Equity, is now under appeal. It is in no sense a final judgment and may not be invoked for the benefit of plaintiff under Section IX of defendant's franchise. The rates now being charged in Texarkana, Arkansas are in no sense a voluntary rate; nor is it a rate which defendant has been finally compelled to charge.

Defendant, to all plaintiff's pleadings, states that plaintiff is undertaking to go back seven (7) years to upset rates prescribed on June 13, 1930; that an immense amount of money would be involved if plaintiff should be entitled to recover what is claimed; that the amount could not be determined without complex accountings as to each consumer; defendant estimates it would total probably more than $150,000.00; that if any recovery were had, defendant would have offsets against numerous consumers; that an account would have to be stated as to each; that it would be necessary first for the court to hear this case in any event and make findings of fact and conclusions of law as to the issues raised herein, both of fact and of law; then to have accountings as to all concerned; that it will be necessary to state the accounts before a decree could be rendered herein, that defendant has numerous amounts owing to it from the consumers in the way of bills, merchandise, appliances, gas [fol. 149] ice boxes, heaters, stoves, pipings, etc., which defendant would be entitled to offset in case of any recovery herein.

Defendant further pleads all applicable statutes of limitation; the two year statute, the four year statute, and the five year statute.

IV

Sections VIII-A and IX

Defendant denies it is estopped from asserting the invalidity of Section VIII-A and Section IX of the franchise ordinance. Defendant alleges that to obtain rates which will cover its operating expenses, depreciation requirements and give it a fair return, is its duty both to the investing public and holders of its securities and to the stockholders and gas consumers.

A. Section IX Invalid and Inapplicable

(1) Defendant states that Article E of the ordinance of March 13, 1923 is invalid, and has not been in force at any time since June, 1930. It was superseded by Section V of the ordinance of June 13, 1930. Article E, if it could be considered, is and would be invalid for the same reasons as those herein set out in relation to Section IX of the ordinance of June 13, 1930.

(2) Defendant states that Section IX of the ordinance of June 13, 1930, is invalid and inapplicable because:

[fol. 150] (a) It conflicts with Section V of said ordinance;

(b) It conflicts with the laws and Constitution of Texas, particularly Article 1124 Revised Civil Statutes 1925, and Article I, Section 17, and Article XII, Sections 3 and 4 of the Constitution of Texas;

(c) If it should be conceded that rates could be controlled by binding contract, there would, in view of the laws and constitution of the state, be such an inevitable conflict between that binding provision and the dominant power to regulate as to render the contract inoperative and, therefore, to cause it to perish from the mere fact of admitting its conflict with the power to regulate.

(d) The duty of the owner of property used for public service to charge only a reasonable rate and thus respect the authority of the government to regulate in the public interest, and of the government to regulate by fixing such a reasonable rate as will safeguard the rights of private ownership, are interdependent and reciprocal.

(e) It undertakes to deprive the City Council of Texarkana, Texas, of its lawful and sole jurisdiction;

(f) It undertakes to delegate to and vest in extraterritorial authorities and bodies outside of the State of Texas, the non-delegable power to regulate or fix rates within the State of Texas;

(g) It is ultra-vires the Council; and without sanction of the charter or the laws governing the city;

[fol. 151] (h) It undertakes to change and modify rates upon a contingency, or future event, in violation of the con-

stitution, statutes, laws and rules of Texas, which provide that rates may be changed only after notice and hearing and only if the facts justify;

(i) Section IX undertakes to provide that if defendant should be compelled to place into effect any rates in Texarkana, Arkansas, less than the rates prescribed in Texarkana, Texas, then the lessened rate in said City in Arkansas shall apply in Texarkana, Texas, and defendant shall not be authorized to charge any higher rate, (1) regardless of Texas laws and Constitution (2) regardless of the fact that said rates would be confiscatory of defendant's property and cause it daily loss;

(j) Section IX is inapplicable because the decree of December 1, 1933 of the Court in Arkansas was not based on, and the Court did not undertake to consider the merits of the rate;

(k) Section IX is inapplicable because the rates in Arkansas were not legally or lawfully changed at any time after May 8, 1923;

(l) Section IX is invalid because it undertakes to abrogate prescribed rates;

(m) The City Council of Texarkana, Texas, by the statutes of Texas and particularly Article 1124 Revised Civil Statutes, and the city's charter, is charged with the inalienable duty of functioning as a rate regulatory body; it may [fol. 152] not by contract or otherwise suspend, surrender, abridge or put in abeyance its ever-present duty to regulate rates according to law when called upon or illegally vary the rates that are prescribed by it;

(n) The City may not under any circumstances bind itself by contract as to rates;

(o) Defendant is itself without power to contract as to rates;

(p) Even if the City had power to contract as to rates, the contract will fall when as here it conflicts with the exercise of the rate making duty, the duty to regulate being supreme;

(q) The variation of rates dependent on action in another city amounts to an illegal delegation of the regulatory

power. Particularly is this true here where the attempted delegation is to a city in another state, having an entirely different regulatory system;

(r) The laws of the State of Texas do not authorize and never authorized the fixing of a conditional rate, or of a rate to take effect in the present subject to being revoked and abrogated by the happenings of some event attached to such a rate as a condition subsequent;

(s) Section IX must yield as the effect of its enforcement would be to cause confiscation of defendant's property and business;

(t) It is too vague, obscure and uncertain to be applicable or enforceable; its meaning is not susceptible of ascertainment;

[fol. 153] (u) If it could be applicable or enforceable as to any period of time, it is too vague and uncertain as to other periods of time;

(v) Asserted discrimination cannot make Section IX valid or enforceable.

(w) Section IX is invalid because it would violate the Sections of the special charter providing that the City Council shall not prescribe any rate which will yield less than ten per cent per annum on the actual costs of the property, as amended by Article 1124 Revised Civil Statutes of 1925, requiring the rates to be based on the fair value of the property; rates are not authorized to be based on rates in another city;

(x) It is unlawful and impracticable to make the rates in Texarkana, Texas follow the course of the rates in Texarkana, Arkansas; taxes and expenses in the different states and cities being different; having different ad valorem, occupation and license taxes; insurance rates; workmen's compensation; paving cutting requirements; different physical properties; values and quality of pipe; public liability rates; litigation and rate case expense; damages, accidents; lost and unaccounted for gas; density of population; difference in soil conditions; and depreciation requirements, etc.;

(y) Because Section IX is incapable of any reasonable application. Plaintiff in its brief at p. 5 says:

"So far as the rights of the consumers in Texarkana, are [fol. 154] concerned, the court cannot now pass upon them from and after February 16, 1934. If the gas company is successful in its Arkansas suit, then there will have been no discrimination from and after February 16, 1934."

The reason for this statement is that from February 16, 1934 to December 4, 1936, the rates in Texarkana, Arkansas were higher than the rates charged in Texarkana, Texas. If defendant is successful on appeal to the U. S. Circuit Court of Appeals in the Arkansas suit, defendant will charge higher rates in Arkansas than the prescribed rates in Texas. The rates charged in Texarkana, Arkansas from February 16, 1934 to December 4, 1936 were:

$1.75 for the first 1,000 cu. ft. of gas,
$ .75 each for the next 2,000 cu. ft.,
$ .55 each for the next 7,000 cu. ft.,
$ .35 each for each additional 1,000 cu. ft.

From the statement of plaintiff above quoted, that "the Court cannot now pass upon" the rates in Texarkana, Texas, "from and after February 16, 1934," and the statement that, "If the gas company is successful in Arkansas suit, then there will have been no discrimination from and after February 16, 1934," it would follow there would be, in Texarkana, Texas, from February 16, 1934 until some time in future, a hiatus in which no one would be able to say what have been the applicable gas rates in Texarkana, Texas since February 16, 1934. The ground offered by the plaintiff for the existence of such queer condition is that [fol. 155] Texas rates are dependent upon the success or failure of defendant in the Arkansas suit. Such supposed impossibility, of determining, by any means within or without the State of Texas, what are the legal rates in Texarkana, Texas illustrates the principle, that the City cannot delegate or surrender the regulatory power; that, where a power is granted and the method of its exercise prescribed, that method excludes all others and must be followed. If defendant shall be required to make reparations as to dates prior to February 16, 1934 it would necessarily be on the ground that prior to February 16, 1934, the 1923 Arkansas rate became applicable in Texarkana, Texas, and not the rate prescribed by the City Council of Texarkana, Texas in Section V of the ordinance of June 13, 1930.

If reparation or reduction should be required since February 16, 1934, or if defendant should be required to reduce its rates in Texarkana, Texas, and if defendant should be successful in the appeal in the Arkansas suit, the prescribed rates in Texarkana, Texas would become again operative and judgment would have to be rendered against the gas consumers in Texarkana, Texas in favor of defendant.

If defendant should be required to reduce its rates in Texarkana, Texas below the prescribed rates, and if the rates in force in Arkansas from February 16, 1934 to December 4, 1936 should be upheld in the Arkansas appeal, the rate in Texas would of and from said date be increased to [fol. 156] those prescribed in Section V of the ordinance of 1930 automatically and retroactively, and without action by the City Council of Texarkana, Texas.

On the other hand, if defendant should lose the appeal in Arkansas, the rates prescribed in 1930 in Texarkana, Texas would under the claim of said City, have had no operative force even for one instant. If reparation should be ordered, it would mean that defendant would have to pay out the difference between the revenues collected under the rates prescribed by the City Council of Texarkana, Texas and the calculated revenues that would result from applying the Arkansas rates of 1923 to the gas consumed in Texas; and that defendant adopt Arkansas rates in Texas, though under appeal and though conflicting with the prescribed rates.

Section IX conflicts with and, if valid, would operate to change the laws of Texas, to deprive the Council of its jurisdiction, to unlawfully abrogate prescribed rates, to delegate and vest in extra-territorial authorities and bodies outside the State of Texas, the non-delegable police or rate power. Moreover, the rates would vary upon contingencies.

(z) Because of the grounds set forth as to Section VIII-A, infra.

(3) Section IX, even if valid, is not applicable to the situation in the case at bar:

(a) It is not applicable to the period from June 1930 to December 1, 1933, it is not retroactive.

[fol. 157] (b) Section IX is not applicable to the period subsequent to November 23, 1933; defendant from and after

said date had the right to charge reasonable rates without being limited to the prescribed rates of Section V of the ordinance of June 13, 1930, or to the rates prescribed in 1923, or to any lower rates than those applied for in the City Council on November 3, 1933; defendant exhausted all legislative remedies open to it and under the circumstances plaintiff has no right to enforce confiscatory rates.

(c) As to the period from December 1, 1933 to February 16, 1934, Section IX is inapplicable; the rates in Texarkana, Texas were under contest; and the rates in Texarkana, Arkansas were in contest.

(d) As to the period from February 16, 1934 to December 4, 1936, Section IX is inapplicable; the rates in Texarkana, Arkansas were higher during said period, and are involved in the appeal to the United States Circuit Court of Appeals for the Eighth Circuit. Supersedeas was granted in Texarkana, Arkansas against any refunds during that period.

(e) Section IX is inapplicable to the period from December 4, 1936 to any subsequent times; the rates in Texarkana, Arkansas in said period are under contest and are involved in the appeal to the United States Circuit Court of Appeals for the Eighth Circuit.

(f) Section IX is inapplicable to any period since November 4, 1934; on November 4, 1933 defendant gave one-[fol. 158] year's notice of application for increased rates over the rates that were applied for under the application filed by defendant on November 3, 1933 then pending for an immediate increase in rates on which defendant was requesting and seeking prompt hearing and action.

(g) Section IX is inapplicable to period of time since January 23, 1935; plaintiff itself on January 23, 1934 gave notice that it would on January 23, 1935 enter upon hearings for change and modifications of rates.

B. Section VIII-A. Invalid and Inapplicable

(1) In its brief filed in this court plaintiff states:

"In the statement of issues, immediately preceding this outline of the argument, two matters raised in the answer are described which will not be argued. They are:

A. The matter of the company's agreement that it must give one year's notice before applying for an increase in rates. This is not argued because it is now moot.

B. The matter of the now pending suit in Arkansas. This is not argued because the present suit in Arkansas is a wholly separate proceeding from the litigation which resulted in the decree of December 1, 1933, compelling the gas company to lower its rates and make refunds * * *" (p. 20).

(2) Defendant, after the procedure it has taken, is entitled to proceed in the counter-claims to enjoin the pre-
[fol. 159] scribed rates. Section VIII-A, if it should be held to be valid, gives defendant the right to apply for increased rates after one-year notice, and recognizes the right of defendant to increase its rates after one-year notice, which notice was given on November 4, 1933, as admitted by plaintiff. More than three years have since expired. The plaintiff has so far prevented defendant's efforts to secure reasonable rates.

(3) Defendant states that even if Section VIII-A of the franchise agreement could be assumed to be valid, the Council has waived Section VIII-A by its actions in calling upon defendant to go through a complete rate case, and in having a full hearing and on the merits acting upon defendant's application, etc., consuming great time, effort and expense of defendant, and in holding itself out as willing to consider the matter upon its merits and in considering the matter on its merits. Such actions of the city council on its merits were reviewable by the Railroad Commission.

(4) Defendant states that the power of rate regulation cannot be suspended or held in abeyance; that rates cannot be contracted by any binding provisions; that after notice and hearing rates are subject at all times to change if the facts justify; under the regulatory powers of the state, said Section VIII-A is invalid; said section attempts to make binding provisions as to rates suspending and holding in abeyance the governmental power of the state and its sub-
[fol. 160] divisions; such power is subject to exertion at any time; governmental power of regulation of rates cannot be suspended for any definite and certain period of time. Rates, however fixed and prescribed, whether in a franchise

or contract or in an order of a regulatory body, are subject to change at any time thereafter, either upon the initiation of the city or upon the application of the defendant.

(5) Said Section VIII-A, since it is not binding upon plaintiff, is unilateral and cannot bind defendant for want of mutuality.

(6) Defendant had the right on November 23, 1933, to place into effect the schedule of rates it had filed with the city council. This right is grounded in the fact that the franchise rates were and are and will continue to be daily confiscatory of defendant's property, resulting in daily loss as herein shown.

(7) Defendant pleads that plaintiff has no cause of action to prevent defendant from pursuing the procedure to increase the prescribed rates, nor to enjoin defendant's appeal to the Railroad Commission and never had such a cause of action, but the effect of what it did blocked the procedure. Plaintiff alleges that statutes of Texas

"provide that pending the hearing before the city council said increased rates should not be placed into effect, and in the event of an appeal, they should not be placed in effect until the appeal should be passed upon by the Railroad Commission."

[fol. 161] (8) Defendant reiterates the allegations made in its application of November 3, 1933, filed in the city council, copy of which is attached to defendant's pleadings, and reiterates the allegations in its motion and affidavits filed November 9, 1933, copy being hereto attached as Exhibit "A," and made a part hereof.

(9) Defendant has done all it could to get relief without avail, and has and will have no remedy for what it has daily lost and continues to lose unless this Court takes jurisdiction and dissolves the temporary injunction.

(10) Article 6058 of Revised Civil Statutes of Texas, of 1925, is construed by the decisions of Texas to provide that, where the utility seeks to increase existing rates, the increase cannot be put into effect with or without bond until the commission makes its final order on appeal from refusal of the council to allow the increase. Without notice or hearing, the

Railroad Commission of Texas refused to act on defendant's application for a temporary order superseding the existing rates, pending final hearing. The Railroad Commission of Texas has jurisdiction of the appeal from the order of the council dated January 23, 1934, refusing to grant defendant's application of November 3, 1933, but refuses to recognize or act upon the appeal at all unless defendant complies with a provision for a certain bond relating solely to the Resolution of December 12, 1933, which the Commission may not legally require.

[fol. 162] The Statute of Texas is construed to require that the existing rates continue in statu quo and be not increased until final disposition of the case before the Commission, does not afford an adequate remedy; is invalid as so construed by the courts of Texas; is violative of the due process and equal protection of law clauses of the Fourteenth Amendment to the United States Constitution; requires enforcement of rates that are daily confiscatory until such time as the Commission makes final disposition which may take from a few months to many months; in the case at bar it is taking years. Defendant alleges that on such appeal the Railroad Commission, unless it can grant supersedeas, is required by law to hear such appeal without requiring the posting of supersedeas bond; and the action of the Railroad Commission in refusing to proceed to hearing is erroneous and contrary to law and deprives defendant of the hearing it is entitled to from said Railroad Commission and of substantial rights. Under such circumstances defendant has the right to maintain its action to charge the rates it applied for in the city council or to fix its own rates, to prevent daily confiscation of its property; defendant asks that the Court sustain this right. Defendant has taken all the steps open to it under the Texas statutes as far as it could.

(11) Section VIII-A is invalid and inapplicable for the same reasons as Section IX as herein alleged.

[fol. 163] V.

Special Charter Provisions and Regulatory Statutes

Defendant pleads that the city charter contains the following provisions which are the only ones relevant to this case:

Sec. 33. Council —. Ordinance —. Title —. The style, title and caption of all ordinances shall be "Be it ordained

by the City Council of the City of Texarkana, Texas," but the same may be omitted from ordinances published in book or pamphlet form.

Sec. 34. Council —. Ordinance Committee —. All ordinances when introduced before the council, except in cases of emergency, shall be referred to an ordinance committee, to be appointed by the council, and such ordinance introduced may be printed for the use of the members of the council, but no ordinance shall be so changed or amended as to change its original purpose.

All ordinances referred to said committee shall be reported back to the council at its next regular meeting, unless otherwise ordered by the council, with the report of said committee thereon annexed thereto.

Sec. 35. Ordinance —. Reading —. No ordinance shall be passed, except in case of emergency, until the same shall have been read in full in two several meetings of the city council.

Sec. 36. Ordinance —. Passage —. No ordinance shall be passed upon the day it is introduced before the council [fol. 164] for the first time, except in cases of emergency, and in all cases of emergency the council shall have the power to pass such ordinances as may be deemed necessary under the emergency clause, without referring same to the ordinance committee upon request of the mayor and the vote of the three-fifths of all the aldermen present.

Sec. 37. Ordinance —. Ayes —. Nays —. The ayes and nays shall be taken upon the final passage of all ordinances or resolutions, and entered upon the minutes of the council by the city secretary, and every ordinance or resolution shall require for its passage an affirmative vote of a majority of all the aldermen elected, except on ordinances or resolutions granting franchises or levying taxes, in either of which events it shall require for the passage of such ordinance or resolution an affirmative vote of three-fifths of all the members elected to the city council.

Sec. 160. Franchise —. Vote —. The rights of the City of Texarkana in the use of the public streets, alleys, squares, parks, bridges and all public places are hereby declared to be inalienable to any person, firm or corporation, except by license permit and franchise passed by the city council on

the affirmative vote of three-fifths of all the members of said council elected.

Sec. 161. Term —. No franchise, lease or permit to the use of the streets, alleys, squares, parks, bridges or other public places or the use of either or any of them shall be [fol. 165] made by the city council for a longer term than twenty-five years.

Sec. 162. Ordinance —. Publication —. Before any grant of franchise shall be made by the council, the terms thereof embodied in the form of an ordinance, as agreed to by the applicant and the council, shall be published in full, for one week next before the date of its passage, in the official newspaper of the said city, and publication to be paid for by the applicant.

Sec. 163. Terms - . Said proposed franchise shall contain all the terms and agreements between the parties thereto, and it must expressly set forth that the council shall have the right and privilege of regulating and controlling the operation of all business done thereunder, fixing fares, rates, tolls and charges and inspecting the business and work from time to time as it progresses, and rate regulations shall conform to Section 197 of this charter.

Sec. 163a. Terms —. In the event that any franchise or permit is so given by said council, which shall not contain such stipulations therein as provided for in Section 162 of this charter, then it shall, nevertheless, be considered that all of the said stipulations contained in said Sections 162, 163 and 197 are part and parcel of the said contract and franchise, just as though written therein, and the said applicant so accepting such franchise, as well as their heirs, assigns and successors, shall be held and firmly bound [fol. 166] thereto, notwithstanding such omissions. As amended by 31st Leg., passed under emergency clause.

Sec. 164. Readings —. Three Meetings —. No franchise shall be granted under the emergency clause and none shall be granted until after due publication and after being read in full in three several meetings of the city council, and any franchise granted hereunder, which is not in accordance with the provisions of this section, shall be subject to be set aside by any person interested in a suit for that purpose.

Sec. 196. That the city council shall have the power to regulate by ordinance the rates and compensation to be charged by all water, gas, light and telephone companies, corporations or persons using the streets and public grounds of said city and engaged in furnishing water, gas, light and telephone service to the public, and to prescribe reasonable rules and regulations under which such commodities shall be furnished and services rendered, and to fix penalties to enforce such charges, rules and regulations; provided, that the city council shall not prescribe any rate or compensation which will yield less than ten per cent per annum net on the actual costs of the physical properties, equipments and betterments. Said city council may also fix the charges which may be collected for transporting passengers and baggage in vehicles engaged in public service.

[fol. 167] Article 1124, Rev. Civ. Statutes

Article 1124 Rev. Civil Statutes of Texas of 1925 is as follows:

Any city having a special charter or a charter adopted or amended under the provisions of chapter 13 of this title, and having authority under its charter to determine, fix and regulate the charges, fares or rates of compensation to be charged by any person, firm or corporation enjoying a franchise in said city, shall in determining, fixing and regulating such charges, fares or rates of compensation, base the same upon the fair value of the property of such person, firm or corporation devoted to furnishing service to such city, or the inhabitants thereof, and not upon any stocks or bonds issued or authorized to be issued, by, or any other indebtedness of, such person, firm or corporation. No city shall be responsible, for, concerned with, authorize, approve or have jurisdiction over, the issuance or sale of any stocks or bonds by any such person, firm or corporation, but the issuance and sale thereof shall be governed solely by the Constitution and laws of this State applicable thereto. (Acts 1st C. S. 1921, p. 152.)

The Constitution of State of Texas

The Constitution of State of Texas provides in Article I, Section 17 as follows:

Section 17. No person's property shall be taken, damaged or destroyed for or applied to public use without adequate

compensation being made, unless by the consent of such [fol. 168] person; and, when taken, except for the use of the State, such compensation shall be first made, or secured by a deposit of money; and no irrevocable or uncontrollable grant of special privileges or immunities, shall be made; but all privileges and franchises granted by the Legislature, or created under its authority shall be subject to the control thereof.

And Sections 3 and 4 of Article XII of Constitution of State of Texas provides as follows:

Section 3. The right to authorize and regulate freights, tolls, wharfage or fares levied and collected or proposed to be levied and collected by individuals, companies or corporations for the use of highways, landings, wharves, bridges and ferries, devoted to public use, has never been and shall never be relinquished or abandoned by the State, but shall always be under Legislative control and depend upon Legislative authority.

Section 4. The first Legislature assembled after the adoption of this Constitution shall provide a mode of procedure by the Attorney General and District or County Attorneys in th name and behalf of the State to prevent and punish the demanding and receiving or collection of any and all charges, as freight, wharfage, fares, or tolls, for the use of property devoted to the public, unless the same shall have been specially authorized by law.

VI

(a) Defendant in the first of the year 1930 made application to the City Council of Texarkana, Texas, for change [fol. 169] and modification of rates for gas distribution in the City of Texarkana, Texas. The rates prescribed by the City Council of Texarkana, Texas, on March 13, 1923 were in effect at that time. Hearings were held from time to time on defendant's application; voluminous testimony and exhibits were introduced in the Council, the principal witness being Victor A. Dorsey of Victor A. Dorsey & Company, an engineering firm of Chicago, Illinois of national repute. The city council after hearing denied the application and refused to change the existing rates. Appeal was taken by defendant to the Texas Railroad Commission

where full hearings were had, voluminous testimony and exhibits being introduced. During the progress of the hearings in the Railroad Commission, a new schedule of rates was proposed by plaintiff. Whereupon proceedings were re-opened in the city council; new rates were prescribed; a new franchise was issued by ordinance dated June 13, 1930. The Railroad Commission approved the new rates and dismissed appeal from the prior action of the city council.

The rates prescribed by the city council in the ordinance of June 13, 1930 were put into effect and have been charged at all times since in Texarkana, Texas. Said rates are set forth in Section V of said ordinance reading in part as follows:

Section V

"Section V. A hearing as to the rates which shall be charged by the Grantee having been had, and the Grantee [fol. 170] having waived any right to notice of the fixing of such rates, the rates to be charged by the Grantee for natural gas furnished under the provisions of this Ordinance are hereby determined and fixed by compromise agreement, said rates are as follows, towit:

Domestic and Commercial Rate

(a) For the first one thousand (1000) cubic feet per meter of gas or fraction thereof sold to any domestic or commercial consumer during any one month—$1.00 per thousand cubic feet. Said charge shall also be made regardless of whether any gas is consumed or not.

(b) For the next one hundred and forty-nine thousand (149,000) cubic feet of gas or fraction thereof sold to any domestic or commercial consumer during any one calendar Month—$ .50 per thousand cubic feet. All gas sold at $ .50 per thousand cubic feet is subject to 5% discount if paid within ten (10) days after bill is rendered."

Such prescribed rates thereupon became the only lawful or legal rates in Texarkana, Texas except as defendant secured the right to charge increased rates by exhausting the remedies and showing inadequacy and failure to produce a fair return.

(b) More than three years later defendant on November 3, 1933 applied to the City Council of the City of Texarkana,

Texas for a change in rates by written application and notice, copy of which is attached as Exhibit "C" to plain-
[fol. 171] tiff's petition and made part hereof by reference. Defendant, as stated in said application, was and is suffering current losses amounting to $350.00 per day; and confiscation of its property was and is taking place; and will continue to take place unless the Section V rates are increased.

Defendant on November 4, 1933 filed with the City Council of Texarkana, Texas, notice reading as follows:

"To the Honorable Mayor and Members of the City Council of the City of Texarkana, Texas:

You are hereby notified pursuant to the terms of a certain franchise, dated June 13, 1930, that the grantee therein, Southern Cities Distributing Company, will apply for an increase in rates one year after date of giving this notice.

This notice contemplates an application for an increase in rates over such rates as have been applied for pursuant to the application of said grantee, Southern Cities Distributing Company, now pending, for an immediate increase in rates upon which Southern Cities Distributing Company is requesting and will seek prompt hearing and action.

Southern Cities Distributing Company, by Paul McBride, General Manager.

Filed: G. D. Garrett, City Sec. Nov. 4, 1933."

Defendant on November 9, 1933 filed motion for prompt hearing and affidavits and requested that the city council proceed to hearing, calling attention to the fact that no remedy existed for recovery of the day to day losses which [fol. 172] were then taking place; copy of the motion and affidavits being hereto attached, marked Exhibit "A," and made part hereof; and the statements therein made are here re-affirmed as though fully copied at this point.

The city council on November 10, 1933 passes a resolution directing the city attorney to use all available means in law and in equity that might be necessary to prevent any increase in rates until such time as the council might deem that a change in rates should be justified.

(c) Defendant on November 14, 1933 was present in the Council by its attorneys with witnesses, and requested permission to introduce its evidence. The council refused to hear defendant; but propounded a questionnaire calling

for numerous facts pertinent to the issue whether defendant was entitled to an increase in rates, and passed:

"A Resolution calling on Southern Cities Distributing Company for Information Needed by the Council in Connection with said Company's Application for New Rates and Ordering said Company Not to Put into Effect the Proposed Rates Shown in the Notice and Application filed with the City Secretary on November 3, 1933."

The Resolution referred to defendant's application and motion for prompt hearing asking the council to pass upon that part of the application for prompt preliminary relief; referred to Section VIII-A of the ordinance of June 13, [fol. 173] 1930; and stated that there were no provisions in the Statutes of the State of Texas which would authorize the council to place new and increased rates into immediate effect and that

"The Council is willing, if proper information is submitted to it, but without waiving any of its rights under said franchise ordinance above described and without waiving any of its rights or any of the rights of the consumers under the laws, general and special, of the State of Texas, to consider the question whether it would waive said provisions of said franchise."

And the Resolution called upon defendant for voluminous information and detailed evidence as to defendant and the pipe line systems and as to all matters relating to the fixing of rates; and recited that the council:

"* * * does order and require that before the Council will proceed with the hearing on the application heretofore filed with it, said information shall be furnished in writing, in duplicate and under oath, the Council finding that it is necessary that it have knowledge of the facts hereinafter set forth in order to enable it to pass upon said application and to perform its duties to the gas consumers in said city, said information so required being follows:" (here follow detailed and voluminous questionnaire and interrogatories going into great detail.)

[fol. 174] This resolution in Section II referred to important factors in fixing the rates and in determining the question whether defendant was losing money in its plant

in Texarkana, Texas, and recites that "The Council cannot pass upon the question * * * without the information hereinbefore called for.

The Resolution in Section III ordered defendant "not to put the proposed new rates into effect pending a hearing and decision upon its application," and postponed a hearing until the information should be furnished; provided in Section IV that the council would pass on objections to any of the questions on November 28, 1933; provided in Section V that "as soon as the Southern Cities Distributing Company informs the Council when it can and will furnish the information herein called for, the Council will take up the question of setting its application for final hearing."

(d) Plaintiff on November 16, 1933 filed Petition in the District Court of Bowie County, Texas (being Case No. 106 In Equity now in this Court), to enjoin defendant from increasing its rates in Texarkana, Texas, alleging that defendant was not entitled to apply for an increase in rates, except upon a year's notice under Section VIII-A of the Ordinance of June 13, 1930, and that defendant was bound:

"to supply gas under the rates granted and established therein,"

[fol. 175] and that:

"Said portion of said franchise granting such rates is contained in Section V of said ordinance."

Temporary restraining order was sought immediately on the filing of said suit and was obtained on the same day, without notice to or knowledge of defendant, and without a hearing, restraining defendant, as prayed, which was to prevent defendant from putting into effect on November 23, 1933, or at any other time or in any other manner except as provided in the franchise, rates not in conformity with the terms of said ordinance, reference being made to the record for certainty as to the terms of said injunction. This suit was in due course of time removed to the Federal Court, in which answer and counterclaim on December 20, 1933, was filed by defendant. Plaintiff on January 15, 1934, filed amended and substituted petition to include other subjects and defendant on May 9, 1934, filed amended and substituted answer and counterclaim. Defendant states that such pleadings cover the entire situation except that plain-

tiff pleads subsequent litigation in the State of Arkansas; that all such pleadings were filed before the Johnson Act, Title 28 U. S. C., Section 41 as amended May 14, 1934, C 283, par 1, 48 Stat. 775; that the Johnson Act does not affect pending suits (Idem par 2) that the Johnson Act is on that and on other grounds totally inapplicable to defendant's counterclaims; that the jurisdiction of this Court has been enlarged by the Federal Declaratory Judgment [fol. 176] Act of June 14, 1934 (Sec. 400, Title 28 U. S. C.). The counterclaims are substantially the same as the answers to plaintiff's petitions. Defendant, under the first part of Equity Rule 30, is under mandatory necessity of setting up its counterclaims. A fortiori, the counterclaim are proper under the second or optional part of said Rule 30. It is necessary that the Court handle this case for all purposes and proceed to a final determination of all maters in issue.

(e) Defendant, though enjoined from increasing its rates by the injunction November 16, 1933, continued to prosecute with due diligence its application before the City Council of Texarkana, Texas, for an increase in rates; and the city council continued to hear said application. Defendant filed request that the questionnaire be amended in certain respects, and on November 28, 1933, appeared by its attorneys with witnesses. The city council passes a resolution amending the interrogatories and propounding additional interrogatories.

(f) The city council on December 12, 1933, in the absence of defendant, its attorneys, witnesses, or representatives and without notice to defendant and without hearing, passed a resolution which referred to a decree in a suit of Southern Cities Distributing Company vs. The City of Texarkana, [fol. 177] Arkansas, in the United States District Court for the Western District of Arkansas, dated December 1, 1933, discussed infra.

The resolution of December 12, 1933, referred to Section IX of the franchise of June 13, 1930, in Texarkana, Texas; and in Section I provided that defendant

"• • • is now ordered and directed to comply with its franchise contract and agreement and to restore in the City of Texarkana, Texas, the rates for gas which were in effect in said city on and prior to the passage and acceptance of the franchise ordinance above described, to put such rates

into effect on all bills rendered by it to gas consumers on and after December 1, 1933, and to maintain such rates in effect until such time as they may be lawfully changed."

and in Section II that:

"The City Attorney is directed to call upon said company at once to make refunds to all its consumers in Texarkana, Texas of the difference between the amounts collected from them under said franchise since May 30, 1930, and the rates which have been found in said case to have been the lawful rates in the City of Texarkana, Arkansas, during said period and upon the basis of which refunds have been ordered to consumers in said city;"

and that in the event of refusal of defendant to make such refunds in Texarkana, Texas, the City Attorney was ordered "to file suit in the name of the city as the representative and for the benefit of the gas consumers in said city for recovery of said refunds." Copy of the resolution is [fol. 178] attached to plaintiff's original bill and is referred to for certainty as to terms.

The Resolution of December 12, 1933 is a nullity, invalid and of no force it was passed without notice to the defendant and without evidence or a hearing; it was passed in only one reading, the city charter requiring three separate readings on three separate meetings; because there was no publication as required by the city charter; there were failures in other points to comply with the city charter, such as the title, style and caption, emergency, non-reference to committee, no reporting back; passage on the same day of introduction; failure to record proper vote. The only action of the city council concerning a reduction of rates after notice and hearing is the Resolution of January 23, 1934 which gives notice that the city council would on January 23, 1935 enter into a hearing concerning the reduction of rates in Texarkana, Texas.

Regarding said Resolution of December 12, 1933 plaintiff in its brief states:

"The resolution of the Council shows on its face that it was taken in view of and to secure performance of the franchise agreement of the company, and was not taken under the powers conferred on the Council as a rate regulating tribunal."

"This was simply the action of one party to an agreement calling upon the other party to carry out its obligations and directing that suit be brought if such other party refused. [fol. 179] It does not purport to be the order of a rate regulating tribunal, made after formal notice and taking of testimony." (p. 24).

and,

"We know of no statute or decision which holds that where a gas company, or any other utility, makes an agreement with a city as to rates or any other matter, than that the City Council may not direct that company to carry out and perform its agreement, or may not direct that suit be brought to compel it to do so, without first giving the company formal notice and opportunity to be heard. The only question for decision was whether the City should insist on the performance of an obligation voluntarily entered into by the gas company. A mortgagor is not entitled to a hearing before the mortgagee calls on him to pay or before the mortgagee orders a foreclosure in the event of non-payment. The maker of a note to a bank is not entitled to formal notice and a hearing before the board of directors of the bank before the bank calls on him to pay or orders suit if he fails to pay" (p. 25).

Plaintiff quoting Article 6058 Revised Civil Statutes of 1925, states:

"All of this is a description of an appeal from an order of a regulatory tribunal. A resolution of a city council calling upon the company to carry out an agreement to reduce rates is not a *decision, regulation, ordinance or order* reducing rates What the legislature evidently intended was to provide a review for the actions of the Council as a rate making tribunal, * * * not to subject its franchise [fol. 180] agreements to a review by the Commission" (p. 27, italics are the plaintiff's).

These admissions by plaintiff should not be permitted to prevent the court from holding said Resolution to be ineffective to reduce the gas rates as counterclaimed by the defendant, but should rather be taken as confession of defendant's counterclaim for affirmative order to such effect. Defendant, when appealing on March 5, 1934 from the Council's Order of January 23, 1934 denying increased rates,

out of caution took the necessary steps to appeal from said Resolution of December 12, 1933, if it were appealable. If said Resolution of December 12, 1933 had been legally passed and were a rate-reducing ordinance within the scope of Article 6058 Revised Civil Statutes of 1925, the petition of plaintiff insofar as based upon said Resolution would be premature. But defendant understands that plaintiff grounds its asserted reparation solely upon Section IX of the franchise ordinance of June 13, 1930 and upon alleged discrimination, and not upon said Resolution of December 12, 1933. Since the Resolution was illegally and improperly passed and since it is conceded not to be a rate-reducing ordinance, the Railroad Commission had no jurisdiction thereof, and the attempted appeal is non coram judice. The bond referred to by the Railroad Commission which pertains only to said resolution, is unauthorized for this and other reasons shown infra.

[fol. 181] (g) The City Council of Texarkana, Texas, continuing the hearing, on December 27, 1933 passed a resolution with reference to the time of the hearing of defendant's application, and on January 2, 1934 passed another resolution postponing the time of the hearing; defendant at all times pressing its application.

(h) On January 22 and 23, 1934, the City Council of Texarkana, Texas, held a full hearing at which plaintiff and defendant each were represented by attorneys; both plaintiff and defendant introducing voluminous evidence consisting of documentary and record evidence, testimony of experts, engineers, accountants, and other witnesses, covering all phases of a rate case.

The city council at the conclusion on January 23, 1934 passed a resolution stating that its resolution of November 4, 1933

"recited that it was willing, if proper information be submitted to it, but without waiving any of its rights under said franchise contract, to consider the question whether the provisions of said contract were oppressive or unjust and whether it should waive the same and calling upon said Southern Cities Distributing Company to furnish the proper information from which the Council could determine said question."

and that the city council

"having heard all the evidence, does hereby make the following findings with reference to the question as to whether [fol. 182] it should waive the provisions of said franchise agreement and consent to consider an application for increased rates without said one-year's notice and with reference to the propriety of the increased rates and charges proposed by the company." The findings of the City Council consist of 25 pages concluding:

(1) The Council refuses to waive and still insists upon the provision of one year's notice and orders the City Attorney "to pursue and insist upon his application now pending in the Courts for an injunction to secure a specific performance of said franchise agreement,"

(2) that the rates proposed by defendant "are unjust and unreasonable and are exhorbitant and improper rates and would result in an even greater and more unjust discrimination against the consumers of gas of Texarkana, Texas, than are the rates the company is now collecting in violation and in disregard of its franchise agreement to give the consumers in this city the benefit of any rates it is compelled to place in effect in Texarkana, Arkansas, and said Southern Cities Distributing Company is forbidden to put such proposed new rates into effect."

(3) "The City Attorney is ordered, and directed to continue and to insist upon his application now pending in the courts for an order directing said company to comply with its franchise agreement and to place in effect in Texarkana, Texas the rates it has been compelled to place in effect in Texarkana, Arkansas;" and

[fol. 183] (4) "notifies the company that one year after date it will enter into a hearing to determine whether the rate should not be reduced to 40¢ per m.c.f."

(i) Defendant on March 3, 1934, appealed its application to the Railroad Commission of Texas by filing petition with said Commission and praying that said Commission fix and approve the schedule filed by defendant. In this proceeding defendant appealed not only from the Resolution of January 23, 1934, but also out of caution from the Resolution of December 12, 1933 in case it should be considered appealable.

The City did all it could to prevent defendant proceeding with the appeal; on April 21, 1934, it filed in the Railroad Commission Motion to Dismiss the Appeal or, in the alternative, on account of the injunction and suit, that all further proceedings in the Commission be abated until such time as the litigation in the United States District Court for the Eastern District of Texas should be finally disposed of.

Defendant undertook to proceed in the Railroad Commission and requested that plaintiff's motion to dismiss the appeal be set for hearing and action, but so far its efforts to get any action at all have been unavailing.

The Commission made no order, except a provision as condition precedent, shown by its pleadings herein for a certain $10,000.00 bond concerning the Resolution of December 12, 1933 only, and will not act on either of the appeals unless [fol. 184] such bond is filed, although the bond was referable only to the order of December 12, 1933. The Commission was and is without legal authority to require bond as to the order of January 23, 1934, and did not attempt to require bond as to such order; the bond named in its order was totally inapplicable thereto; it was also erroneous and inappropriate even to the order of December 12, 1933, above described. Defendant has not filed such bond, but nevertheless expected to prosecute its appeal and would have done so, if it had not been prevented as herein shown. The appeal from the Resolution of January 23, 1934 was from a denial of an application for increase in rates; the provision for bond was without legal authority since no provision for increase in rates pending the appeal was made, nor could be made under Texas decisions; defendant did not elect to make said bond.

(j) Plaintiff on May 23, 1934 and pending the appeal to the Railroad Commission, filed the second case in the District Court of Bowie County, Texas, now numbered 109 in Equity, in this Federal Court, in large part, like plaintiff's amended pleadings in the first suit, now Case No. 106 in Equity in this Court, except that the new suit, now Case No. 109 in this Court, the Railroad Commission are also made defendants and plaintiff seeks to restrain defendant from taking any steps in the Railroad Commission, and to prevent the Railroad Commission from acting. The Railroad Com- [fol. 185] mission have filed answer. Cases Nos. 106 and No. 109 have been consolidated by court order.

Events in Texarkana, Arkansas

Defendant states that the rates in Texarkana, Texas are governed and regulated by the limitations defined in the special charter of said City as modified and limited by the law and constitution of Texas and that the complicated course of litigation and controversy in Texarkana, Arkansas cannot be followed; if it could be followed, it could not regulate the rates in Texarkana, Texas. Nor can the rates in said City of Texarkana, Arkansas be material. However, if it should be held material, defendant states that in Texarkana, Arkansas defendant in the first part of the year 1930 made application to the City Council of Texarkana, Arkansas for change and modification of the existing rates for gas distribution in the City of Texarkana, Arkansas, the existing rates having been prescribed on May 8, 1923, by ordinance of the City Council of Texarkana, Arkansas.

The City Council of Texarkana, Arkansas on May 30, 1930 passed a Resolution fixing rates for that city. Some time after the last of June 1930 referendum petitions were filed in that city for vote upon said resolution of May 30, 1930 under the Referendum Amendment to the Constitution of Arkansas. However, nothing was done regarding it until 1931 at which time a suit was brought in the Circuit Court of Miller County, Arkansas for mandamus requiring an elec-
[fol. 186] tion. It was adjudged that election should be held concerning the resolution of May 30, 1930 under the Referendum Amendment to the Constitution of Arkansas. The judgment was affirmed in the Supreme Court of Arkansas, Southern Cities Distributing Co. v. Carter, 41 S. W. (2d) 1085. Appeal to U. S. Supreme Court was dismissed, 285 U. S. 525, 526. Election was held, continuing the rates of May 8, 1923 and preventing the Resolution of May 30, 1930 from having any application whatever. Defendant then filed suit in the U. S. District Court of Texarkana, Arkansas, and secured a temporary injunction. This was reversed, City of Texarkana v. Southern Cities Dist. Co., 64 F. (2d) 944 (C. C. A. 8). The Court in the original opinion referred to a contract as to rates having been admitted to have been made in Texarkana, Arkansas, but, on re-hearing withdrew the reference to the possibility of a contract as to rates in Arkansas, and placed the reversal on the ground that the election as to the Resolution of May 30, 1930 by vote in the City of Texarkana, Arkansas, had the same effect as if it

had never been passed; that the rates of May 8, 1923, continued as the only lawful or legal rates in Texarkana, Arkansas; that there had been no change in said city; that there had been no prior attempt to gain administrative relief by any method proper for such purpose, and ordered dismissal of the bill without consideration as to whether the rates were confiscatory. Certiorari was denied, 290 U. S. 650. Upon [fol. 187] return to the U. S. District Court, decree of December 1, 1933 enforced the mandate.

Defendant on October 23, 1933 filed with the City Council of Texarkana, Arkansas, a formal application for change and modification of rates in Texarkana, Arkansas. Full hearing was completed on December 22, 1933 resulting in a resolution of the City Council of Texarkana, Arkansas denying defendant's application for change in rates. The City Council of Texarkana, Arkansas on November 14, 1933 had served notice on defendant in Texarkana, Arkansas, that the city council of said city would also consider whether or not the rates collected by defendant for natural gas in Texarkana, Arkansas should not be reduced below the May 8, 1923 rates. The Resolution on December 22, 1933, recited that the city council of Texarkana, Arkansas, did not have evidence from which it could accurately determine certain facts and continued to January 23, 1934 its proceedings in Texarkana, Arkansas, to reduce the rates of May 8, 1923. The said proceedings were again postponed to February 13, 1934. On this last date the City Council of Texarkana, Arkansas, without further evidence, passed a resolution prescribing rates, which were less than those prescribed in the ordinance of Texarkana, Arkansas of May 8, 1923. This resolution has been permanently enjoined.

Defendant prepared bill in equity to enjoin the enforcement of what are called the 1923 rates in Texarkana, Arkansas which had been held to be the only lawful rate in [fol. 188] Texarkana, Arkansas; and on February 9, 1934 gave notice to the City of Texarkana, Arkansas, of application for temporary injunction, to be heard on February 16, 1934, in the United States District Court for the Western District of Arkansas at Fort Smith, Arkansas. The order of the City Council in Texarkana, Arkansas dated February 13, 1934, was passed after notice of said suit and prescribed a lower rate. Whereupon defendant re-drafted its bill in equity to enjoin the prescribed rates in Texarkana, Arkansas, including the last order of the city council.

Hearing on February 16, 1934, of the application for temporary injunction resulted in the Court enjoining the City of Texarkana, Arkansas from enforcing the prescribed rates, or any less rates than the schedule filed by defendant, and from interfering with defendant in charging in Texarkana, Arkansas the rates set forth in the schedule it had filed with the council. The injunction continued in operation from February 16, 1934, until December 4, 1936, when decree was rendered by the District Court permanently enjoining the rates fixed by the city council on February 13, 1934, but dissolving the injunction as to the previous rates. Defendant secured supersedeas and appealed to the United States Circuit Court of Appeals for the Eighth Circuit sitting at St. Louis, Missouri, and has within the last few days docketed the case and filed the record in said court. The case will be subject to hearing and decision in the fall term of 1937.

[fol. 189] The question of determining upon rates to be charged for gas in the City of Texarkana, Arkansas, has been in litigation, and has not yet been finally determined in any permanent way. The basis of rates used for refunds in the City of Texarkana, Arkansas, prior to December 1, 1933, was based on a decree that the rates provided for in the May 8, 1923 ordinance adopted by the City Council of the City of Texarkana, Arkansas, were the only legal or lawful rates and were continued in force at all times since May 8, 1923. The rates in Texarkana, Arkansas since February 16, 1934, are still in contest on appeal as above shown. In view of these facts and circumstances, the pending litigation and the unsettled question as to the Arkansas rates, defendant denies the allegations of plaintiff to the effect that a schedule of rates by which defendant is bound under said Section IX of the ordinance of June 13, 1930, has ever been permanently settled upon in the City of Texarkana, Arkansas.

VII

Confiscation

The rates set forth in Section V of the ordinance of June 13, 1930 are confiscatory and have caused and will continue to cause daily confiscation of defendant's property. The effect of the actions of the City Council of the City of Texarkana, Texas in undertaking to deny to defendant the

right to earn a fair return upon the present fair value of the property used and useful in rendering public utility gas [fol. 190] service to the City of Texarkana, Texas is to deprive defendant of its property without due process of law, deny it the equal protection of the law, and usurp its business management, all in contravention and violation of the Constitution and laws of the state of Texas and of the Fourteenth Amendment to the Constitution of the United States of America. A fortiori, any rate less than the Section V rates would be confiscatory.

(1) That: (a) On the basis of the March 13, 1923 rates for the first half and Section V rates for the second half of the year ending December 31st, 1930, defendant's gross revenue in Texarkana, Texas was $307,286.76, its expenses $399,347.90, or a difference of $92,061.14 between its expenses and gross revenue.

(b) On the basis of Section V rates for the year ending December 31st, 1931, defendant's gross revenue was $306,640.48, its expenses $365,812.90, or a difference of $59,172.42 between its expenses and gross revenue.

(c) On the basis of Section V rates for the year ending December 31st, 1932, defendant's gross revenue was $261,432.54, its expenses $327,087.46, or a difference of $65,654.92 between its expenses and gross revenue.

(d) Except for the first half of 1930, when the March 13, 1923 rates were collected, the rates charged were the Section V rates. If the March 13, 1923 rates should be applied, a greater loss would have resulted in each of said years.

(e) If the rates proposed in defendant's application of November 3, 1933 be applied, defendant's revenue in 1932 [fol. 191] would have been approximately $313,037.29, its total expenses for said year being $327,087.46, leaving a difference between gross revenue and expenses of approximately $14,050.17.

(f) Subsequent years do not materially change the results.

(2) That: (a) The present fair value of defendant's gas distribution system in Texarkana, Texas, used and useful in rendering gas service to its customers in the City of

Texarkana, Texas, as of June 30, 1934, is not less than $525,195.64, and as of subsequent dates is higher.

(b) Defendant is entitled to interest at the rate of eight per cent per annum on the fair value of said distribution system, amounting to not less than $42,015.65; that a less rate of return would shake confidence in defendant's securities and would not enable defendant to obtain money for the operation and financing of its business.

(c) Defendant is entitled to an annual depreciation charge of not less than five per cent upon $411,645.64, the fair value as of June 30, 1934 of the depreciable property in the distribution plant in Texarkana, Texas, amounting to $20,582.28.

(d) Defendant must take into consideration in the statements of earnings such sums as may be necessary to allow for federal income taxes, calculated to be not less than $6,698.15.

(e) Defendant, for the service which it renders to gas consumers in the City of Texarkana, Texas, is entitled to [fol. 192] charge rates which will produce sufficient revenue to pay the expenses, an amount for federal income taxes, proper depreciation and reasonable return upon the fair value of the property used and useful in rendering such service. Even on the basis of the rates in the schedule filed in the city council by defendant, defendant would fail by $83,346.25 in 1932 to earn expenses, an amount for income taxes, depreciation and a reasonable return; the revenues and expenses for subsequent years are even further from producing sufficient to take care of the expenses, an amount for income taxes, depreciation and a reasonable return. Defendant alleges that the experience in the immediate future will not be sufficiently favorable to permit earning expenses, taxes, depreciation and reasonable return.

(3) The relationship between defendant and the Arkansas Louisiana Pipeline Company and Reserve Natural Gas Company of Louisiana, which operated the pipeline system supplying natural gas to defendant for distribution in its distribution system at Texarkana, Texas was that, except for a few shares, the stock of each of said three corporations was owned by the Arkansas Natural Gas Corporation.

Defendant has since acquired the property of said companies.

(4) The distribution plant does not produce natural gas and has no supply for sale and distribution in Texarkana, Texas other than from the system, now owned by defendant, [fol. 193] for which the charge for gas furnished for domestic purposes was $0.39 per thousand cubic feet, and other rates for gas used for other purposes, which were reasonable charges.

(5) The pipeline system, extending into the states of Arkansas, Texas and Louisiana, produces in part, and purchases at the wells of other producers in part, the gas it transports to distribution systems and other purchasers. The pipeline system is economically and efficiently managed. The rates charged by said system are the lowest reasonable rates which can be charged for gas furnished at Texarkana, Texas. Said rates produce less than expenses, depreciation and a reasonable return on the fair value of the property of said pipeline system and produce less than the value of the service rendered.

(6) The present fair value as of June 1, 1934 of the production and transportation property was not less than $35,041,826.21.

(7) The revenues and expenses of said pipeline system for 1930, 1931 and 1932 were:

	1930	1931	1932
Revenues	$7,497,780.07	$6,534,397.65	$5,947,160.44
Expenses	4,128,211.14	3,904,185.52	3,314,671.84
Losses in Gasoline Plants	7,609.27	231.61	7,531.09
Earnings Available for depreciation and return on Investment and income Taxes	3,361,959.66	629,280.52	2,624,957.51

[fol. 194] Deducting $349,130.80 for 1930; $161,209.30 for 1931; and $184,124.57 for 1932, for income taxes, and, deducting annual depreciation charge of five per centum of depreciable transportation property of $1,285,069.70, the

net earnings available for return on the property of said pipeline system were $1,826,959.16 for 1930; $1,182,201.52 for 1931; $1,154,963.24 for 1932; or on $35,041,826.21, the fair value of the system as of June 1, 1930 a return of 5.21% for 1930; 3.37% for 1931; and 3.30% for 1932.

(8) That the City Council of Texarkana, Texas in undertaking to find whether the rates and charges filed and applied for by the defendant were just and reasonable, found:

(a) That the Arkansas Natural Gas Corporation is substantially owned and actually controlled by the Cities Service Company; that the Cities Service Company is managed and controlled by Henry L. Doherty, doing business as Henry L. Doherty & Company: Whereas, there was no evidence before said council of the ownership of the Arkansas Natural Gas Corporation, or of the control and management by the Cities Service Company or by Henry L. Doherty & Company; such finding with respect to the Arkansas Natural Gas Corporation is incorrect and without foundation. On the contrary, the owners of the preferred stock of the Arkansas Natural Gas Corporation select the majority of the board of directors of that corporation and thereby con- [fol. 195] trol the same. Cities Service Company does not own a majority of the preferred stock of said Arkansas Natural Gas Corporation.

(b) That the sums paid to Henry L. Doherty & Company under contract made by Arkansas Louisiana Pipeline Company and the Reserve Natural Gas Company of Louisiana, referred to as "pipeline companies," are not properly chargeable into expenses of such pipeline systems in arriving at the cost and reasonableness of the charges for gas furnished defendant by such pipeline systems, because the cost of the service rendered by Henry L. Doherty & Company to such pipeline companies was not shown: Whereas, under said contracts and the relations of the parties thereto, such charges are reasonable, just and proper for the service rendered. Henry L. Doherty & Company built up and maintained a complete organization for the designing, construction, operation and development of public utilities and natural gas properties. This organization consists of experienced executives, financial advisors, construction, valuation and gas engineers, geologists, technicians, rate experts and accountants. The expense of a system like the said pipeline

systems of maintaining such an organization to provide the services furnished by Henry L. Doherty & Company would be prohibitive. Such contracts placed at the disposal of the pipeline systems, engineering, accounting, geological, business and financial services of a value and of a character and extent which could not be economically acquired by individual systems or any small group of them. Like contracts [fol. 196] are made by other public utilities with similar organizations such as: Ford, Bacon & Davis, Stone & Webster and others. The propriety of such contracts is to be determined by the sound business judgment of the owners of the companies. The activities of Henry L. Doherty & Company of direct benefit to distributing plants and pipeline systems are those tending to increase consumption of natural gas by advertising, developing and marketing of gas burning appliances; geological, technical and research, tax, valuation and rate, purchasing, training of personnel, preparation and care of corporate records, engineering, accounting, auditing, finance and construction.

(c) That the sum of $66,042.50 paid in 1930 for rentals on non-producing gas leases should not be charged into the operating expenses of the pipeline systems; because such leases are not at present used for production of gas; a considerable part is located in Mississippi, more than a hundred miles from the nearest pipeline of the pipeline companies; the pipeline companies have reserves of gas under their present producing leases adequate to supply their present requirement for approximately five years; these non-producing leases were acquired and are being held for the use of customers whom the pipeline companies hope to serve at least five years in the future: Whereas, such non-producing leases are as to a large percentage thereof, in proven acreage and constitute a fair and reasonable reserve without [fol. 197] which a pipeline system would be of little value. Such leases are located within a reasonable range of the pipeline system and none of such reserves are located so as not to be of full value to the pipeline systems; these located in Mississippi being in the vicinity of pipelines with whom such systems may at any time exchange gas to the advantage of both; and supplies and reserves limited to a period of approximately five years would be wholly inadequate to guarantee continued and uninterrupted service. Maintenance of such gas reserve is not only good business judg-

ment, but an absolute necessity to guarantee adequate and uninterrupted service and a matter in which the city council should not be permitted to substitute its business judgment for that of the management of the said pipeline systems.

(d) That the sum of $63,666.28 amortization of cost of non-producing leases should not be charged into the operating expense of the pipeline systems, because such leases have not been drilled and proven to be non-productive, and the charge is an amortization of the cost of acquiring such leases and not incurred in connection with the property now used and useful to the present consumers of gas: Whereas, the cost of acquiring such leases amortized over the primary term thereof is a fair and proper charge and necessary to maintain adequate reserves to insure continued and uninterrupted service, dictated by good business judgment and without which the value of the properties of said pipelines [fol.198] would be greatly diminished. Such properties are both used by and useful to the present consumers of gas. None of such reserves have been acquired without first subjecting them to critical geological investigation and analysis.

(e) That the charges for bad debts and adjustments should be reduced to the amounts actually charged off: Whereas, the accrual of such charges is proper and should be included in the expenses for the reason that such accruals are results arrived at by experienced accountants and credit men taking into consideration the experience over a term of years. It is a safe and proper method of arriving at proper charges for bad debts and adjustments of such systems and plants as defendant operates.

(f) That the annual charge of five per cent depreciation on the transportation and general property, excluding producing property should be reduced to two per cent: Whereas, a depreciation allowance of five per cent on the value of the depreciable property is fair, just and reasonable and the allowance of two per cent depreciation, and the finding of the value of $24,132,581.53, as the depreciable property is unfair, unjust, unreasonable and arbitrary. The actual experience of the pipeline companies demonstrates that the business of producing and transporting gas is a hazardous one, resulting in the continual replacement of pipeline and building of new lines, exhaustion of gas fields and reserves, and the five per cent depreciation is not more than reason-

able, fair and just, and that a less depreciation allowance [fol. 199] is arbitrary, unjust and unreasonable.

The sum of $24,132,581.53 found by the city council as the value of the depreciable property of the pipeline companies is arbitrary and unreasonable.

The amount of depreciation which should be allowed is not affected by the net balance shown in replacement reserves on the books of the pipeline systems. The actual book charges against reserves in particular years have no relation to the amounts which should be allowed annually against expenses and credited to depreciation reserve account; such actual book charges are not averaged over a life cycle of the entire properties; such experience is not available to the pipeline companies, a large portion of the system of said companies having been built since 1928.

(g) That the present fair value of the property of the pipeline companies, upon which they are entitled to earn a return is not less than $27,334,274.28: Whereas, as hereinabove shown, the fair value as of June 1, 1930, on the basis of cost of reproduction new, less depreciation, is not less than $35,041,826.21.

The city council, in arriving at its said figures, excluded the sum of $4,267,120.80, going concern value, which represents cost of attaching and developing the business and which is measured by fixed charges for interest, depreciation and taxes on the portions of the property that are idle or unused during the development period for the time that [fol. 200] such portions were idle and unused. It is a value that an established business has over a business projected but not established.

The city council reduced the sum of $1,404,382.96 working capital, to $500,000.00, based on its finding that the expenses of the pipeline companies for a sixty day period would be such sum. The actual experience of the pipeline systems and their estimated needs for the future in maintaining and operating their properties show that the figure found by the city council is inadequate and insufficient to meet the needs of said pipeline systems.

The city council, in arriving at its valuation excluded the sum of $1,123,505.65, cost of financing. This disregards the actual experience of these and other systems in projecting an enterprise such as this pipeline system, and takes into no account the actual experience of marketing securities

in order to procure capital with which to construct and build such enterprises.

(h) That the rate of return of eight per cent on the valuation of the transportation and general properties of the pipeline systems should be reduced to six per cent because of depressed business conditions and because the pipeline systems were built to carry a greater volume of gas than it is now carrying and because its business is no longer hazardous: Whereas, the percentage of eight per cent is just and reasonable. The experience of these and other pipeline systems in the business of producing and transporting natural gas shows that it is hazardous; that the [fol. 201] sources of supply are constantly being depleted and changed, and the pipeline systems moved, replaced and rearranged. A less rate of return would result in impairing defendant's ability to produce capital or make its securities unattractive; and would result in impairing its ability to render the gas service required by plaintiff, to defendant's detriment and that of its customers.

The said city council, in arriving at its said figures, took into account the experience of said pipeline systems for the year 1930, but based its valuation on prices of 1932 much lower than the valuations in 1930. If the figures of 1930 should be used, the prices of 1930 for valuation purposes should likewise be used.

The rates of return as found by the city council, above shown, were based on erroneous deductions and allowances; they are incorrect and arbitrary and without foundation in fact.

(i) That the amounts paid Henry L. Doherty & Company by defendant for services rendered during the years 1930, 1931 and 1932, amounting to $5,377.52, $5,366.21 and $4,577.07, should be stricken from the expenses of the distribution plant at Texarkana, Texas for the reason that the cost of rendering such services to Henry L. Doherty & Company was not shown: Whereas, for the reasons set forth with respect to the services rendered to the pipeline systems under similar contracts with said Henry L. Doherty & Company, such charges are fair, reasonable, just and proper for the services rendered and a matter of agree-[fol. 202] ment, as to which the sound business judgment of the management of defendant should not be disregarded.

(j) That the proper method of calculating the cost of gas delivered from the pipeline systems is not the price charged nor the cost of the service based on use, but should be fixed on the basis of the proportion of total expenses and return on property which the total gas sold to consumers in Texarkana, Texas bears to the total gas sold by the pipeline companies to all consumers: Whereas, the proper method of calculating such cost to defendant, if not upon the charged price, is not less than the actual cost of the service based on use; the allocation based on the proportion of gas sold to consumers in Texarkana, Texas to the total volume of gas sold by said pipeline companies is arbitrary, unsound and illegal.

(k) That there should be deducted from the value of the property or rate base, upon which a return should be allowed, the sum of $60,000.00 for going concern value: Whereas, such sum represents an added value, measured by depreciation and interest on idle plant, cost of training men, taxes, and cost of attaching business; or a value which an established business has over a prospective one.

(l) That there should be deducted from the value of the property or rate base, upon which a return should be allowed, the sum of $20,000.00 for cost of financing: Whereas, such sum is less than the actual cost of securing capital employed in the property and business of defendant in serving its customers in Texarkana, Texas, and is a proper [fol. 203] charge in arriving at the value of the property used and useful in the gas service of defendant in the city of Texarkana, Texas.

(m) That the depreciation rate of five per cent on depreciable property of defendant in Texarkana, Texas, should be reduced to two per cent: Whereas, the depreciation allowance of five per cent on the valuation of the depreciable property of defendant is fair, just and reasonable, and a less rate unreasonable and wholly arbitrary. The actual experience of defendant, its predecessors and others demonstrates that the business of distributing gas in Texarkana, Texas due to shifting of lines, development of service and other factors, requires a calculation of rate of depreciation of not less than five per cent and that a less depreciation allowance is unreasonable and arbitrary.

(n) That no allowance should be made for federal income, tax, either in the expenses of the pipeline systems or the distribution plant, because such tax has not actually been paid: Whereas, the assessment for such tax depends upon net earnings and the effect of the right to file consolidated returns avoiding the payment of income taxes by offsetting gains of some with losses of others, does not destroy the initial liability for such tax, and has been repealed. It is an expense of the plant and systems and must be, as such, taken into account.

(o) That the rate of return of defendant upon the fair valuation of its property used and useful for serving its customers in Texarkana, Texas is six per cent: Whereas, [fol. 204] a rate of return less than eight per cent will result in impairing the ability of defendant to procure capital and to render the gas service required to its customers in Texarkana, Texas, and would be confiscatory.

(p) That the city of Texarkana, Texas, is entitled to free gas for use at its municipal buildings, jails and fire stations: Whereas, the furnishing of free gas to said city for such purposes would further decrease the revenues of defendant and result in further loss and confiscation; plaintiff is wholly without right to require such service, free of cost or without paying the proper rates and charges therefor. Defendant alleges that the proper rates and charges are set forth in defendant's application filed with the city council on November 3, 1933.

(q) That the amounts of unaccounted for gas are in excess of the amount of gas that would be unaccounted for in a properly maintained plant, and that defendant should not be allowed to charge against the consumers in Texarkana, Texas the cost of gas which escapes from the distributing plant in excess of the proper and normal amount: Whereas, the work necessary to bring the distribution plant of defendant at Texarkana, Texas to the standard found by the said city council consists in repairs and not in new construction; the revenues of said distribution system have not been sufficient since defendant's acquisition thereof in 1928, under the rates existing and charged since such date, to reimburse the bare expenses or sum necessary for such [fol. 205] purposes; defendant has been, and will be, unable to make such repairs as may be necessary to effect such

result unless permitted to charge the proposed rates; that is, the leakage found by the said city council can be properly attained only by proper increase in the rates presently prescribed. The cost of such repairs is a proper expense chargeable against revenues and not a capital expense; it should and must be charged to and borne by those receiving the benefits.

(9) Defendant avers that it is suffering a loss in excess of $350.00 per day by reason of failure to receive sufficient revenue from its operations in the city of Texarkana, Texas; that its revenues from the operation of its properties in Texarkana, Texas are insufficient to pay the operating expenses; that such losses amount to daily confiscation of plaintiff's property; that losses and damages sustained before the hearing cannot be re-couped.

(10) The foregoing property values, depreciation, and return on investment and other considerations bearing upon the sufficiency of the gas rates, are as of June 1, 1934. Since that date and up to the present time, the price of materials, labor, and construction costs have materially increased; the present value of defendant's property has correspondingly increased. Operating and maintenance expenses have likewise increased correspondingly. The revenues, though somewhat increased, are not sufficient to off-set the increase in maintenance and operating expenses. The data brought [fol. 206] up to date would make defendant's earnings situation worse now than it was on June 1, 1934.

Defendant further shows that a new valuation of all the property is now being made and will soon be complete; that such new data should be available by the time this cause will come to trial upon its merits.

(11) That the Fourteenth Amendment of the Constitution of the United States of America provides that no state shall deprive any person of property without due process of law, and guarantees to every person the equal protection of the laws. Defendant is entitled to the benefit and protection of said constitutional provision. Defendant now invokes and urges same as against the actions of said city of Texarkana, Texas with reference to the distribution and sale of gas in said city in undertaking to prevent rates sufficient to avoid confiscation of its property and to earn a

reasonable return above its necessary expenses upon the fair value of its property used and useful in rendering such services.

(12) Defendant states that the effect of the attempts of plaintiff to prevent the charging of the rates filed and applied for, is to impose upon defendant a daily loss amounting to daily confiscation of its property; that any lower rates will fail to yield revenue sufficient to pay expenses of operation, depreciation, taxes and reasonable return upon the fair value of its said property. That the attempt of plaintiff to force defendant to charge less rates than those [fol. 207] applied for, if successful, will deprive it of its property to its damage in a sum or value exceeding three thousand ($3000.00) dollars, exclusive of interest and costs, without due process of law, and deny defendant the equal protection of the laws; that under the Fourteenth Amendment to the Constitution of the United States no state may deprive any person of property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws: and for the protection of its property defendant does now plead and invoke said provisions of the United States Constitution and the Constitution and laws of the State of Texas. The attempts of plaintiff to keep defendant from putting into effect less rates than those applied for are violative of these provisions of the United States Constitution, and the laws and constitution of Texas.

Wherefore, upon consideration of the Court of its answers and counterclaims defendant prays that the petition and bills of plaintiff be denied; that Sections VIII-A and IX of the franchise ordinance be declared null and void and unapplicable, and be cancelled; that said ordinance be construed to mean that the rates specified should continue until changed, either by an appropriate action on the part of the city or upon application of the defendant; that it be held that the rates filed by defendant in the city council on November 3, 1933 are lawful rates; that the claims made by the plaintiff be cancelled as cloud upon the title of this [fol. 208] defendant to its distribution plant in the city of Texarkana, Texas; that its right to increase its rates as per schedule filed by it be sustained; that defendant recover all costs herein incurred; and defendant prays for such other

and further relief, general and special, to which it may be entitled.

Jno. J. King, Henry C. Walker, Jr., William C. Fitzhugh, William H. Arnold, Jr., Attorneys for Defendant, Arkansas Louisiana Gas Company.

Duly sworn to by Jno. J. King. Jurat omitted in printing.

[fol. 209] EXHIBIT "A" TO AMENDED ANSWER

Found on page 239 Minute Book "K."

Texarkana, Texas,
November 7, 1933.

To the Honorable Mayor and City Council of the City of Texarkana, Texas:

In re Notice and Application of Southern Cities Distributing Company Filed November 3rd, 1933

MOTION FOR PROMPT HEARING AND ACTION

I

Applicant, Southern Cities Distributing Company, asks for immediate preliminary hearing and action by the Council upon that part of its application, filed November 3rd, 1933, which asks for immediate authority to place into effect the new schedule of rates contained in its application, pending final hearing. Applicant states that it is essential to avoid daily confiscation of Applicant's property, that the Council have a prompt meeting and hearing and temporarily authorize the new rates to be placed into immediate effect pending final hearing upon reasonable bond or upon Applicant's putting up the difference in the rates in a depository to be named. Applicant is prepared to present its evidence at once.

Applicant further requests the Council to hear it upon this part of the application and not to delay the same; and states that, in the absence of supersedeas, stay, and temporary relief, its application for prompt action would fail to produce relief to which it is entitled and that postpone-
[fol. 210] ment would amount to denial of its application

for temporary relief as much as express denial. Applicant now requests and insists that it be accorded a preliminary hearing to show the damage which is being done each day to applicant's property and to show the necessity of immediate action by the Council. If applicant does not place in effect the new rates immediately, it will have no remedy for recovering each day's loss until such time as obtains final relief.

II

Applicant hereto attaches affidavit showing the necessity of immediate preliminary consideration and action by the Council authorizing the Applicant, upon security, to place the new rates into immediate force and effect, pending final hearing, and hereby requests that the Council have a meeting on November 10, 11, 13 or 14, 1933, to pass upon this part of the application and grant stay of the existing rates.

III

Wherefore, Applicant prays: That the Council hold prompt preliminary hearing and grant that part of its application requesting action providing for temporary relief, under bond, supersedeas, or other method; and that the amount of the bond be fixed, or a depository be named in which to impound the difference between the present rates and the rates applied for.

H. C. Walker, Jr., King, Mahaffey, Wheeler & Bryson,
W. H. Arnold, Jr., Attorneys for Applicant, Southern Cities Distributing Company.

[fol. 211] State of Louisiana,
Parish of Caddo:

P. F. McBride, being first duly sworn, states on oath that he is Manager of Southern Cities Distributing Company, the plaintiff in the foregoing motion, that he is authorized to make this affidavit, and that he has read the foregoing motion and knows the contents thereof; that the allegations therein contained so far as they relate to his own acts are true, and so far as they relate to the acts of others, he believes them to be true.

That in regard to all other matters and things alleged in the foregoing motion which are now within personal knowl-

edge of this deponent, the deponent has been informed and he verily believes the same to be true.

Paul F. McBride.

Sworn to and subscribed before me this the 7th day of November, 1933. P. L. Penoncel, Notary Public.

STATE OF LOUISIANA,
Parish of Caddo:

On this 7th day of November, 1933, personally appeared before me, a Notary Public in and for the Parish of Caddo, State of Louisiana, J. C. Hamilton, who being first duly sworn deposes and says that he is Engineer in charge of the valuation department of the Arkansas Natural Gas Corporation and is competent and qualified to make the following affidavit:

[fol. 212] That, at the request of the Southern Cities Distributing Company, he has made an audit of the books and records of that company in particular respect to the revenues and expenses of the Texarkana, Texas distributing plant; that such audit shows that the gross earnings realized from the Texarkana, Texas, distributing property for the year ending December 31, 1932 amounted to $261,432.54; that the total operating expenses including cost of gas and depreciation, amounted to $347,071.27; that a computation from the above amounts shows that there was a loss suffered of $85,638.73 before computation of return on investment and Federal income taxes on same: that a return of eight per cent upon the fair value of the distributing property would be $41,460.19 and Federal income taxes upon this amount would be $5,700.78: that the addition of these two items to operating loss, as shown above, shows that the amount by which the distributing property failed to earn expenses, depreciation, return on investment and Federal income taxes on same was $132,799.70; that it would be necessary for the company to realize on additional gross earnings of $138,799.70 over that realized during the twelve months period ending December 31st, 1932 in order to earn a sufficient and adequate return upon the fair value of its property; that the company is now and has been suffering an annual loss, as enumerated above, of $132,799.70 and that it is now and has been suffering a daily loss of $363.83; that under the rates in force prior to the application of Novem-
[fol. 213] ber 3rd, 1933, the company has been and will be in future unable to realize anything for depreciation or

interest on investment upon the fair value of its property; that the estimated gross revenue expected from the increased rates, included in the above mentioned application, will not under the gas consumption actually experienced for the year 1932 or reasonably to be expected in future, yield more than adequate or reasonable return upon its investment in the City of Texarkana, Texas.

That, all gas is purchased at the town borders of the Texarkana, Texas distributing plant from the Arkansas Louisiana Pipe Line Company; that the price charged for such gas at the delivery point is fair and reasonable and that the Southern Cities Distributing Company would be unable to purchase a continuous and dependable supply of gas from any other source at any less price: that the Arkansas Louisiana Pipe Line Company and the Reserve Natural Gas Company, through whose lines the gas also passes, are efficiently and economically managed: that, although such pipeline companies are efficiently and economically managed, they have not been able to earn all of their expenses, depreciation and a reasonable return upon the fair value of their investment used and useful in producing, buying and transporting gas to the city gates of Texarkana, Texas, and other distributing plants and customers: that the property of the pipeline systems of the two companies has a fair minimum value, as of January 1st, 1932, upon which rates should be based, of $36,616,007.84: that the gross earning of the pipe line [fol. 214] companies for the twelve months period ending June 30th, 1932 was $5,957,804.16: that the total expenses, including depreciation, amounted to $4,878,034.16: that the net amount available for federal taxes and interest and profit on investment was $1,079,770.00: that federal taxes of $148,468.38 deducted from this amount would leave $931,301.62 available for interest and profit upon the present value of $36,616,007.84: that this would only return 2 54% on the said fair value of such investment which is insufficient and below a reasonable rate of return: that, for several years past, the pipeline companies have failed to earn a reasonable return upon their investment and will as near as can be reasonably expected fail to earn more than a reasonable return upon their investment in future, from town border rates at present in effect.

J. C. Hamilton.

Sworn to before me the 7th day of November, 1933.
P. L. Penoncel, Notary Public.

STATE OF LOUISIANA,
Parish of Caddo:

On this 7th day of November, 1933, personally appeared before me, a Notary Public in and for the Parish of Caddo, State of Louisiana, William H. Lyon, a Valuation Engineer for the Arkansas Natural Gas Corporation, who being first duly sworn deposes and says: that he is an accredited engineer in the employ of the Arkansas Natural Gas Corpora- [fol. 215] tion, competent and qualified to accomplish work covered by this affidavit.

That, at the request of the Southern Cities Distributing Company, he has prepared a valuation of the property of that company composing their Texarkana, Texas distributing plant, and has arrived at the present value of said property for rate making purposes: that a complete inventory of said property was made and priced according to the market value of labor and material necessary to reconstruct this property new as of the approximate date of July 1st, 1933: that an actual inspection of a substantial portion of the property was made and from such inspection the physical condition of the material was obtained, the per cent condition of each item or each group of similar items arrived at, and such per cent condition was applied to the reproduction cost new value to arrive at the present value of the physical property: that there was added to such value of the physical property the working capital, going concern value and cost of financing to arrive at the present fair value of the property for rate making purposes: that this value, as of said date, as stated in the notice and application for change and modification of rate, filed November 3rd, 1933, is in excess of the sum of $515,000.00, and that this is the minimum value that should be used in computing the rate of return on this property.

That, he has prepared a valuation of the property of the Arkansas Louisiana Pipe Line Company and the Reserve Natural Gas Company as of January 1st, 1932, which valua- [fol. 216] tion amounts to $36,616,007.84: that, the prices on this date used in such valuation were lower than they had been for several yaers prior, thereto, and were lower than prices are now or which may be expected: that, such valuation was carefully and efficiently prepared after a complete and detailed inventory and inspection of the property, and that it represents the minimum value upon which the Ar-

kansas Louisiana Pipe Line Company and Reserve Natural Gas Company are entitled to base the depreciation and return on investment for rate making purposes.

Wm. H. Lyon.

Sworn to before me the 7th day of November, 1933.
P. L. Penoncel, Notary Public.

Filed Nov. 9, 1933.

EXHIBIT "B" TO AMENDED ANSWER

Minute Record No. 11, page 230, May 1, 1923

Southwestern Gas and Electric Company's Resolution, Increasing the Rates to be Charged for Natural Gas, Introduced, Read and Adopted

Alderman Temple introduced, and the City Attorney read the following resolution: "Whereas, the Southwestern Gas & Electric Company, a private corporation, has heretofore been, and is now, engaged in and carrying on, in the City of Texarkana, Arkansas, the business of furnishing natural [fol. 217] gas to the citizens of said city, for domestic and commercial purposes as fuel, and for lighting or illumination and for other purposes; and

Whereas, for the aforesaid services so performed by it, the Southwestern Gas & Electric Company has heretofore charged the rates and exercised the rights and privileges following:

Article A. For furnishing natural gas for domestic and commercial purposes and for lighting or illumination in any character of institution whatsoever and for all other purposes—(except for gas used in internal combustion engines and except for fuel used under boilers and in furnaces where gas is used as fuel for strictly manufacturing purposes)—thirty-five cents per one thousand cubic feet for all monthly consumption at any individual installation ranging up to and including one hundred thousand feet; and sixteen cents per one thousand cubic feet for all monthly consumption at any individual installation above one hundred thousand cubic feet, with ten per cent discount applying on monthly accounts when accounts for service rendered are paid at the company's office on or before ten days following date of bill.

Article B. For furnishing natural gas as fuel for manufacturing purposes, twelve cents, net, per one thousand cubic feet.

Article C. For furnishing natural gas for use in internal combustion engines, thirty-five cents per one thousand cubic [fol. 218] feet, with ten per cent discount applying on monthly accounts when accounts for service rendered are paid at the company's office on or before ten days following date of bill.

Article D. In the event that the consumption of gas by any consumer at any individual installation under the prevailing rates does not amount to a net sum of fifty cents for any one month, a net sum of fifty cents is charged to each consumer for such months service at each installation, said charge being known as "A Minimum Charge."

Article E. If on account of non-payment of bills or violation of any rule or regulation, the Company is obliged to shut off the supply of gas of any consumer, a charge of one dollar will be made for turning same on again for such consumer so cut off, and a like charge will be made to each consumer requiring the moving of a meter oftener than once in any twelve months period; and

Whereas, the said Southwestern Gas and Electric Company has heretofore, on the 10th day of April, 1923, given public notice of its purpose and intention to increase the rates and charges for the aforesaid services heretofore prevailing, and by said notice advised the public that it will, hereafter on the 15th day of May, 1923, put into effect the scale of rates and charges for natural gas service supplied by it in the City of Texarkana, Arkansas, and vicinity, here- [fol. 219] inbelow set forth, and has given notice to the City Council of the City of Texarkana, Arkansas, of its intention to put into effect on said date the scale of rates and charges for natural gas service supplied by it in the City of Texarkana, Arkansas, and vicinity, as follows:

Article A. For furnishing natural gas for domestic and commercial purposes and for lighting or illumination in any character of institution whatsoever and for all other purposes—(Except for gas used in internal combustion Engines and except for fuel used under boilers and in furnaces where gas is used as a fuel for strictly manufacturing

purposes)—fifty cents per one thousand cubic feet for all monthly consumption at any individual installation ranging up to and including one hundred thousand cubic feet, and twenty two cents per one thousand cubic feet for all monthly consumption at any individual installation above one hundred thousand cubic feet, with ten per cent discount applying on monthly accounts for services rendered at any individual installation when accounts for services rendered are paid at the company's office on or before ten days following date of bill.

Article B. For furnishing natural gas for use as fuel within boilers and furnaces only for the consumption of gas as fuel for strictly manufacturing purposes, the following schedule of net rates per one thousand cubic feet shall apply for monthly consumption at any individual installation:

[fol. 220]

Consumption of Gas per month in cubic feet	Net rate per one Thousand Cubic feet
First—Five hundred thousand cubic feet	Twenty-one Cents net
Next—One Million Cubic feet	Twenty Cents net
Next—One Million Cubic feet	Nineteen Cents net
Next—One Million Cubic feet	Eighteen Cents net

And for all monthly consumption at any individual installation above three million five hundred thousand cubic feet per month seventeen cents net per one thousand cubic feet, with the understanding that bills for monthly consumption shall be rendered at a gross rate of ten per cent higher than the foregoing net prices, which additional amount of billing will be allowed as a discount provided bills for each month's service are paid at the company's office within ten days following date of bill.

Article C. For natural gas furnished for use in inter*nal* combustion engines the rate shall be forty cents per one thousand cubic feet for all monthly consumption at any individual installation, with ten per cent discount when bills for monthly services rendered are paid at the company's offices within ten days following date of bill.

Article D. In the event that the consumption of gas by any consumer at any individual installation under the rates herein prescribed does not amount to a net sum of fifty [fol. 221] cents for any one month, then the said Southwestern Gas & Electric Company, its successors and assigns, are hereby granted the right to charge such consumer for each installation a net sum of fifty cents for such month's service, whether there is any consumption of gas or not, said charge to be known as "A Minimum Charge" and to be of the amount and nature as the charge hereinbefore prevailing in Texarkana, Arkansas and vicinity.

Article E. If on account of non-payment of bills or violation of any rule or regulation, the said Southwestern Gas & Electric Company is obliged to shut off the supply of gas of any consumer, a charge of one dollar will be made for turning same on again for such consumer so cut off, and a like charge will be made to each consumer requiring the moving of a meter oftener than once in any twelve months period, the charges under this article being the same in amount and nature as the charges now and hereinbefore prevailing in Texarkana, Arkansas, and vicinity; and

Whereas, it has been made to appear to the City Council of the City of Texarkana, Arkansas, and they are of the opinion that the rates and charges proposed to be put into effect by the said Southwestern Gas & Electric Company hereafter on May 15, 1923, are just and reasonable rates and charges:

Therefore, Be it Resolved, that the City Council of Texarkana, Arkansas, hereby approves the following rates and charges for natural gas service supplied by the Southwestern Gas & Electric Company to the citizens of the City of [fol. 222] Texarkana, Arkansas, and vicinity, to be effective on and after the 15th day of May, 1923, to-wit:

Article A. For furnishing natural gas for domestic and commercial purposes and for lighting or illumination in any character of institution whatsoever and for all other purposes—(Except for gas used in internal combustion engines and except for fuel used under boilers and in furnaces where gas is used as fuel for strictly manufacturing purposes)—fifty cents per one thousand cubic feet for all monthly consumption at any individual installation rang-

ing up to and including one hundred thousand cubic feet, and twenty-two cents per one thousand cubic feet for all monthly consumption at any individual installation above one hundred thousand cubic feet, with ten per cent discount applying on monthly accounts for services rendered at any individual installation when accounts for services rendered are paid at the company's office on or before ten days following date of bill.

Article B. For furnishing natural gas for use as fuel within boilers and furnaces only for the consumption of gas as fuel for strictly manufacturing purposes, the following schedule of net rates per one thousand cubic feet shall apply for monthly consumption at any individual installation.

Consumption of Gas per Month in Cubic Feet	Net rate per one thousand cubic feet
First—Five hundred thousand cubic feet	Twenty-one cents net
Next—One Million cubic feet	Twenty cents net
Next—One Miliion cubic feet	Nineteen cents net
Next—One Million cubic feet	Eighteen cents net

[fol. 223] And for all monthly consumption at any individual installation above three million five hundred thousand cubic feet per month seventeen cents per one thousand cubic feet net, with the understanding that bills for monthly consumption shall be rendered at a gross rate of ten per cent higher than the foregoing net prices, which additional amount of billing will be allowed as a discount, provided bills for each months service are paid at the company's office within ten days following date of bill.

Article C. For natural gas furnished for use in internal combustion engines the rates shall be forty cents per one thousand cubic feet for all monthly consumption at any individual installation, with ten per cent discount when bills for monthly services rendered are paid at the company's office within ten days following date of bill.

Article D. In the event that the consumption of gas by any consumer at any individual installation under the rates herein prescribed does not amount to a net sum of fifty cents for any one month, then the said Southwestern Gas &

Electric Company, its successors, and assigns, are hereby granted the right to charge such consumer for each installation a net sum of fifty cents for such month's service, whether there is any consumption of gas or not, said charge to be known as "A Minimum Charge" and to be of the same amount and nature as the charge hereinbefore prevailing in Texarkana, Arkansas, and vicinity.

[fol. 224] Article E. If on account of non-payment of bills or violation of any rule or regulation, the said Southwestern Gas & Electric Company is obliged to shut off the supply of gas of any consumer, a charge of one dollar will be made for turning same on again for such consumer so cut off, and a like charge will be made to each consumer requiring the moving of a meter oftener than once in any twelve months period; the charges under this Article being the same in amount and nature as the charges now and hereinbefore prevailing in Texarkana, Arkansas and vicinity.

After the reading of the above resolution Alderman Cook made a motion, which was seconded by Alderman Chestnutt, that the Southwestern Gas & Electric Company be notified by the City Attorney, to appear before this Council and show reason why such increased rates and charges should be put into effect. The Mayor ordered the roll called on the above motion, and the following vote was recorded: Alderman Cook and Harris voted Aye. Alderman Orr, Thomas, Chestnutt, Ford, Dreyer and Temple voted Nay. Total Ayes 2. Total Nays 6. The Mayor declared the motion lost. Thereupon Alderman Temple made a motion, which was duly seconded by Alderman Ford, that the above resolution be adopted. The Mayor ordered the roll called on the motion for adoption, and the following vote was recorded: Alderman Orr, Thomas, Chestnutt, Ford, Dreyer and Temple voted Aye. Alderman Cook and Harris voted [fol. 225] Nay. Total Ayes 6. Total Nays 2. The Mayor declared the resolution duly passed.

Approved May 8, 1923.

(Signed) George T. Conway, Mayor.

Attested: W. W. Shaw, City Clerk.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

Consolidated Cases Nos. 106 and 109, in Equity

MOTION THAT DEFENDANT'S PLEADING FILED JULY 14, 1937 BE RECOGNIZED AND ORDERED APPLICABLE TO BOTH CASES—Filed July 19, 1937

To the Honorable Judge of Said Court:

Comes now Arkansas Louisiana Gas Company, defendant in the above entitled and numbered causes, and shows the Court:

[fol. 226] That Cause No. 106 and Cause No. 109 have heretofore been consolidated by order of this Court; that following consolidation of said causes plaintiff has filed a supplemental pleading; that defendant on July 14, 1937 filed separate amended answer to plaintiff's original, amended and supplemental pleadings, and counterclaim.

Wherefore defendant moves that the Court make an order recognizing such filing and providing they be taken to apply as defendant's additional pleadings in both cases Nos. 106 and 109 In Equity.

Jno. J. King, Henry C. Walker, Jr., William C. Fitzhugh, William H. Arnold, Jr., Attorneys for Defendant, Arkansas Louisiana Gas Company.

[File endorsement omitted.]

[fol. 227] IN UNITED STATES DISTRICT COURT

Consolidated Cases Nos. 106 and 109, in Equity

[Title omitted]

ORDER GRANTING DEFENDANT'S MOTION TO RECOGNIZE ADDITIONAL PLEADING TO APPLY IN BOTH CASES—Filed July 18, 1937

On this the 19 day of July, 1937, came on to be heard the Motion of Arkansas Louisiana Gas Company for order regarding defendant's separate amended answer to plaintiff's original, amended and supplemental petitions and counter-

claim filed July 14, 1937 and it appearing to the court that the Motion should be granted,

It is Therefore Ordered that said pleading is recognized and it is ordered that it be taken and considered as applying in both Causes Nos. 106 and 109 In Equity.

Randolph Bryant, Judge.

[File endorsement omitted.]

[fol. 228] IN UNITED STATES DISTRICT COURT

Consolidated Cases No. 106 and No. 109, in Equity

[Title omitted]

MOTION OF PLAINTIFF TO STRIKE "SEPARATE AMENDED ANSWER OF DEFENDANT, ARKANSAS LOUISIANA GAS COMPANY TO PLAINTIFF'S ORIGINAL AND SUPPLEMENTAL PETITION: AND COUNTER-CLAIM OF ARKANSAS LOUISIANA GAS COMPANY"—Filed July 19, 1937

To the Honorable Randolph Bryant, Judge of said Court:

Comes the plaintiff, the City of Texarkana, Texas, and moves the court to strike the *"Separate Amended Answer of Defendant, Arkansas Louisiana Gas Company, to Plaintiff's Original and Supplemental Petition; and Counter-Claim of Arkansas Louisiana Gas Company"* and for cause says:

1. Said answer does not state a defense to the plaintiff's cause of action as set up in its original and supplemental bill herein and does not, in said counterclaim, set up any facts constituting a cause of action against the plaintiff.

2. Said pleading does not allege any material facts which occurred after the defendant's former pleadings filed herein [fol. 229] and does not allege that the defendant was ignorant, when its former answer and counter-claim was filed, of any facts set up in this pleading.

3. The defendant in said pleading seeks to have the court hold that the rates filed by the defendant in the City Council on November 3, 1933, are lawful rates and that said rates be approved by this court. Said pleading was filed after the

effective date of the Johnson Act, Title 28 U. S. Code, Sec. 41 as amended May 14, 1934, C. 283, paragraph 1, 48 Stat. at L. 775. In none of the pleadings filed prior to May 14, 1937, in this cause, nor in any part thereof, was any such relief prayed. The only relief prayed in pleadings filed by the defendant prior to May 14, 1934, was that Sections VIII-A and IX of the franchise of June, 1930, be declared null and void. Said answer shows on its face that this court does not, under the Johnson Act, have jurisdiction to grant the relief prayed by the defendant to the effect that its rate schedule which was rejected by the City Council be put into effect.

4. Said pleading is not proper under Rule 34 of the Equity Rules in that the defendant in its answer and counter-claim formerly filed herein alleged that the Railroad Commission of Texas refused to recognize the appeal of the gas company from the order of the council refusing to grant an increase in rates on the ground that the company had refused to comply with a requirement of the Commission that it file [fol. 230] a bond in connection with such appeal. Said allegation is contained in Section XX of the answer formerly filed herein.

In its pleading which the company now seeks to file, it alleges that the Railroad Commission did not prescribe said bond as a condition to the appeal from the order refusing to grant an increase in rates, but that it demanded said bond as a condition to the appeal from the order of the City Council directing the defendant to comply with Section IX of the franchise. Said pleading does not show that the facts so differently alleged occurred after the former pleading was filed or that the defendant was ignorant of the facts when said former pleading was made.

Wherefore, premises considered, the plaintiff prays that the "Separate Amended Answer of Defendant, Arkansas Louisiana Gas Company, to Plaintiff's Original and Supplemental Petition; and Counter-claim of Arkansas Louisiana Gas Company" be stricken and for a decree as prayed in its original and supplemental bill herein.

Ed. B. Levee, Jr., B. E. Carter, Attorneys for Plaintiff.

[fol. 231] [File endorsement omitted.]

In United States District Court for the Eastern District of Texas, Texarkana Division

Consolidated Cases Nos. 106 and 109, in Equity

City of Texarkana, Texas, Plaintiff,

vs.

Arkansas Louisiana Gas Company et al., Defendants

Decree—Filed July 31, 1937

On this the 30th day of July, 1937, court being in session, came on to be heard the actions of the City of Texarkana, Texas, as plaintiff, against Arkansas Louisiana Gas Company as defendant, which the court finds from the record herein was filed in this court on removal from the state district court of Bowie County, Texas, on the 20th day of December, 1933, and further finds from the record that said defendant having the name at that time of Southern Cities Distributing Company, filed its original answer and counterclaim therein on the same date, and which cause was num- [fol. 232] bered upon the docket of this court, No. 106 In Equity, and came on also to be heard the action of said City of Texarkana, Texas, as plaintiff, against Arkansas Louisiana Gas Company and others, which the court finds from the record herein was filed in this court on removal from the state district court of Bowie County, Texas, being numbered 109 In Equity in this court, said actions being heretofore consolidated in this court, the plaintiff in each of said causes being present and represented by its attorneys, Ed. B. Levee, Jr., and B. E. Carter, and the defendant in each of said actions being present and represented by its attorneys, Jno. J. King, W. H. Arnold, Jr., and W. C. Fitzhugh. The pleadings of the plaintiff and of the defendants in both of said actions, including the amended answer and counterclaim filed in the two actions on July 19th, 1937, were read to the court, said pleadings being all of the pleadings filed in both cases Nos. 106 and 109. Thereupon the plaintiff, through its said attorneys, presented and urged the plaintiff's motions to strike said defendant's original and amended answers and counterclaims and all other pleadings of said defendant in each and both of said actions; and

the court after hearing the argument and being advised as to the law, is of the opinion that said motions are well taken as to each and both of said actions, as said defendant's pleadings in the opinion of the court are as a matter of law insufficient either as answers or counterclaims.

It is, therefore, ordered, adjudged and decreed by the Court that the plaintiff's said motions to strike said defend- [fol. 233] ant's original and amended answers, counterclaims and all other pleadings of said defendant, be and the same are sustained as to each of said actions and as to both of said actions and said pleadings are now stricken; to which action of the Court with reference to each of said actions and as to both of them the said defendant in open court excepted, and its exceptions were by the Court allowed.

Said defendant not applying to the Court for leave to further amend in either of said actions, the Court thereupon finds: That Section IX of the ordinance finally passed and approved by the City Council of the City of Texarkana, Texas, on June 13, 1930, is a binding contract between the parties, and that the defendant from said date to the present time has been collecting from its domestic and commercial consumers in the City of Texarkana, Texas, the rates prescribed in Section V of said ordinance; and treating said Section IX as a binding contract, as the Court does, the Court considering what further relief the plaintiff is entitled to, concludes and finds:

1. During the period from June 13, 1930, to December 1, 1933, the defendant collected from its domestic and commercial consumers in the city of Texarkana, Arkansas, similar rates. On December 1, 1933, a decree in the United States District Court for the Western District of Arkansas wherein defendant in this case was plaintiff and the City of [fol. 234] Texarkana, Arkansas, et al., were defendants, being No. 203 In Equity in said court, held that the rates of May 8, 1923, were the lawful rates in Texarkana, Arkansas; and ordered defendant to refund all amounts collected since May 30, 1930, in excess of the amounts that would have been collected under the rates prescribed on May 8, 1923, by the City Council of Texarkana, Arkansas.

For periods of time prior to December 1, 1933, no refunds are due plaintiff or gas consumers in Texarkana, Texas; Section IX is inapplicable to such period. Plaintiff saves exceptions.

2. During the period from December 1, 1933, to February 16, 1934, defendant collected from its consumers in Texarkana, Texas, the Section V rates; and from the consumers in Texarkana, Arkansas, the rates prescribed on May 8, 1923, by the City Council of Texarkana, Arkansas. This court finds that defendant was bound under Section IX to charge in Texarkana, Texas, the Arkansas rates of May 8, 1923, for said period and plaintiff is entitled to recover refunds for the difference in said rates covering said period.

3. On February 16, 1934, a temporary injunction was granted by the District Court for the Western District of Arkansas wherein this defendant was plaintiff, and the City of Texarkana, Arkansas, et al., were defendants being No. 209 In Equity in said court; said injunction protected defendant from interference during the life of said tem- [fol. 235] porary injunction, in charging in Texarkana, Arkansas rates that had been on October 23, 1933, filed by defendant with the City Council of Texarkana, Arkansas. These rates were higher than the Section V rates then charged in Texarkana, Texas. Said temporary injunction was partially dissolved by a decree of said United States District Court for the Western District of Arkansas, on December 4, 1936, and the consumers in the city of Texarkana, Arkansas, recovered judgment against defendant amounts collected in excess of the amounts which would have been produced under the rates of May 8, 1923. Defendant appealed from this decree of December 4, 1936, and superseded said judgment for refunds; said cause is as yet undetermined and is now on appeal in the Circuit Court of Appeals for the Eighth Circuit. Said Federal Court in Arkansas refused an injunction pending the appeal and since December 4, 1936, defendant has been collecting in Texarkana, Arkansas, under said 1923 rates. The court finds that no reduction in rates should be ordered in Texarkana, Texas, under Section IX of the 1930 ordinance, until and unless the above decree in Arkansas should be finally affirmed. Plaintiff's claim for rate reduction from February 16, 1934, to the present time is premature and plaintiff is not now entitled to have the rates reduced in Texarkana, Texas, nor to recover any refunds from and after February 16, 1934. Plaintiff's bill insofar as it seeks refunds for this period and a present reduction in rates is dismissed without prejudice to a new suit in the event the Ar-

[fol. 236] kansas case should be affirmed. The plaintiff excepts to this finding.

II

Section VIII-A of the franchise is in the opinion of the court valid and enforcible, but the question raised by plaintiff's and defendants' pleadings as to said Section VIII-A has become moot since the filing of this suit; more than the time required for notice has elapsed since defendant gave notice on November 4, 1933.

It is therefore ordered, adjudged and decreed that plaintiff recover of defendant, Arkansas Louisiana Gas Company, a sum equal to the difference between the amounts actually collected from the Texarkana, Texas, consumers from December 1, 1933, through February 16, 1934, and the amounts which would have been due from the said consumers under the Arkansas rates of May 8, 1923, reserving to said defendant the right to assert any offsets it may have and to plaintiff and its attorneys any claims they may have against said refunds for attorney's fees or under assignments. Plaintiff shall recover all costs against Arkansas Louisiana Gas Company. Each of the other claims and demands of plaintiff and of all defendants are rejected.

To each finding and conclusion of the court defendant Arkansas Louisiana Gas Company separately and severally objected and excepted and asked that its exceptions be noted [fol. 237] for record which is accordingly done. Plaintiff excepts to the refusal of the court to order refunds for the periods from June 13, 1930, to December 1, 1933, and from February 16, 1934, to the present time and to order the Arkansas rates to be placed in effect in Texas now.

Signed this 31st day of July, 1937.

Randolph Bryant, Judge.

O. K. as to form: Ed B. Levee, Jr., B. E. Carter, Attorneys for Plaintiff.

O. K. as to form: W. H. Arnold, Jr., W. C. Fitzhugh, Jno. J. King.

[File endorsement omitted.]

[fol. 238] IN UNITED STATES DISTRICT COURT

Nos. 106 and 109, in Equity, Consolidated Cases

[Title omitted]

PETITION FOR APPEAL—Filed September 23, 1937

To the Honorable Judge of Said Court:

Now comes Arkansas Louisiana Gas Company, defendant in the above entitled and numbered cause, feeling aggrieved by the final decree granted and entered in this cause dated July 30, 1937, and shows the court that it wishes to appeal from said decree to the Circuit Court of Appeals for the Fifth Circuit, for the reasons specified in the Assignment of Errors filed herewith.

Defendant respectfully requests this court to grant supersedeas of the decree heretofore entered and would show the court that the decree entered finally disposes of the question of certain refunds and directs defendant to pay to the City of Texarkana, Texas for the benefit of certain gas consumers of that city the difference between two certain gas rate schedules covering a period of time from December 1, 1933 to February 16, 1934; the amount of refunds involved for said period is approximately four thousand seven hundred ($4,700.00) dollars.

[fol. 239] Defendant further shows that a previous Order of this court has consolidated causes No. 106 and No. 109 In Equity; that no good purpose can be served by taking separate appeals from the decree heretofore entered, which decree disposes of both cases as consolidated, and that defendant is desirous of taking up its appeal on both cases on a single record for review of both cases.

Wherefore, defendant prays that its appeal be allowed and that citation issue as provided by law, that a transcript of the record proceedings and papers upon which said decree is based and including all proceedings in both No. 106 and No. 109 In Equity, and as consolidated, duly authenticated, be sent to the United States Circuit Court of Appeals for the Fifth Circuit and that the record so made shall constitute the record on appeal for both cases.

That said appeal be ordered to operate as a supersedeas of the decree heretofore entered in this cause and as con-

solidated; and that all further proceedings in this court be suspended and stayed until the final determination of this appeal; that proper bond be fixed in amount and conditioned in accordance with law; and that such other orders be made as necessary and proper to enable defendant to perfect its appeal.

Jno. J. King, H. C. Walker, Jr., W. H. Arnold, Jr., W. C. Fitzhugh, Attorneys for Defendant, Arkansas Louisiana Gas Company, Appellant.

Copy received 9-16-37. Ed B. Levee, Jr., B. E. Carter, Attys. for City of Texarkana, Tex.

[fol. 240] [File endorsement omitted.]

In United States District Court

Nos. 106 and 109, in Equity, Consolidated Cases

[Title omitted]

Assignments of Errors—Filed September 23, 1937

And now, on this the 23 day of September, A. D., 1937 came defendant and appellant, Arkansas Louisiana Gas Company, herein referred to as defendant, by its solicitors, John J. King, H. C. Walker, Jr., W. C. Fitzhugh and W. H. Arnold, Jr., and says that the decree dated July 30, 1937 and duly entered in each of the above causes is erroneous and unjust to defendant for the following reasons:

I

Because the court erred in striking out defendant's answer and counterclaims on the ground that the said plead-
[fol. 241] ings are as a matter of law insufficient to constitute defense to plaintiff's claims and insufficient to constitute counterclaim on behalf of said defendant.

II

The court erred in striking out defendant's answers to plaintiff's original and supplemental pleadings on the ground of being insufficient as a matter of law to constitute a defense to plaintiff's pleadings.

III

The court erred in sustaining plaintiff's petitions against defendant in part and in adjudging that for the period of time from December 1, 1933 to February 16, 1934 plaintiff recover from defendant reparations equal to the difference between the receipts collected in said period under the rates prescribed by the City Council of Texarkana, Texas in Section V of the ordinance of June 13, 1930 and the receipts that would have been collected if defendant had for such period applied in Texarkana, Texas those rates that are set forth in an ordinance passed by the City Council of Texarkana, Arkansas for application in the city of Texarkana, Arkansas and dated May 8, 1923.

IV

The court erred in limiting the dismissal of plaintiff's petition for reparation for periods of time succeeding February 16, 1934 to a dismissal without prejudice, and erred [fol. 242] in not dismissing the bill with prejudice to a new suit for such periods of time, unconditional on what might be the termination of the Arkansas suit.

V

The court erred in holding that rates less than those prescribed by the City Council of Texarkana, Texas in Section V of the ordinance of June 13, 1930 were required to be applied in the City of Texarkana, Texas for the period of time from December 1, 1933 to February 16, 1934.

VI

The court erred in holding in effect that Section V of the ordinance of June 13, 1930 does not contain the only lawful and legal rates in Texarkana, Texas, except insofar as defendant, by reason of having pursued the administrative remedies, is entitled to increase said rates on account of being unreasonably low and confiscatory.

VII

The court erred in holding that Section IX of the ordinance of June 13, 1930 which provides:

"Section IX: If Grantee shall be finally compelled to or should voluntarily place in any rates in the City of Texar-

kana, Arkansas less than the rates granted by this Ordinance, then and thereupon the lessened rate shall apply in the City of Texarkana, Texas, and Grantee shall not be [fol. 243] authorized or permitted to charge and collect any higher rates."

and defendant's acceptance of the ordinance in which said Section appears constituted a contract as to Section IX thereof.

VIII

The court erred in holding that Section IX of the ordinance of June 13, 1930 is valid, notwithstanding the conflict with the laws and Constitution of Texas, and particularly the following:

(a) Article 1124, Revised Civil Statutes of Texas;

(b) Article 1, Section 17, Constitution of Texas;

(c) Article XII, Sections 3 and 4, Constitution of State of Texas,

(d) The City Charter.

IX

The court erred in holding in effect that Section IX does not conflict with the City Charter which provides that an ordinance shall be considered to contain an express stipulation reserving rates under the jurisdiction of the regulatory power.

X

The court erred in holding that Section IX is not in violation of the prescribed power of the city nor of the prescribed method of its exercise and that the prescribed method does not exclude other methods and need not be followed.

[fol. 244] XI

The court erred in rejecting without a hearing defendant's allegations that the resolution of December 12, 1933 ordering defendant amongst other things to comply with the city's construction of Section IX herein quoted is invalid: because passed without notice to defendant and without evidence or hearing; because passed in only one reading, the city charter requiring three separate readings in three separate meetings; because there was no publication

as required by the city charter; because of non-compliance with the charter requirements as to title, caption, style, emergency, non-reference to committee, reporting back vote on same day of introduction and failure to record proper vote; and because the resolution is invalid on the same grounds set out in relation to Section IX which grounds are separately and severally here made by reference without repetition.

XII

The court erred in holding in effect that the City Council may provide for change of rates other than by the exercise of its regulatory power under the requisites of law, and erred in holding that the prescribed rates of Section V were for a period of time properly required to be reduced under the terms of Section IX.

XIII

The court erred in holding that said Section IX does not violate the city charter of Texarkana, Texas, especially the [fol. 245] provisions and condition that the City Council shall not prescribe any rates which will yield less than 10% per annum.

XIV

The court erred in holding that Section IX is valid, because there is no power or authority for the fixing of conditional rate, nor provision for change of rates on a contingency or future event, or rates to take effect in the present subject to being revoked and abrogated by the happening of some subsequent event or condition.

XV

The court erred in holding that Section IX of the ordinance of June 13, 1930 is valid, notwithstanding attempted unlawful delegation, or vesting in extra-territorial authorities and bodies outside the State of Texas, the non-delegable power to regulate and fix rates within the State of Texas under the laws applicable thereto.

XVI

The court erred in holding that the variation of rates dependent on conditions in another city and state is valid, and in holding that Section IX is valid notwithstanding its

making controlling in Texarkana, Texas the rates prescribed in the adjoining city of Texarkana, Arkansas.

[fol. 246] XVII

The court erred in holding in effect that the exercise of the regulatory power and duty of the City Council of Texarkana, Texas as shown in Section V is inferior to asserted contract as to rates; and erred in holding that the rates prescribed in Section V of the ordinance of June 13, 1930 were for the period from December 1, 1933 to February 16, 1934 in conflict with and were suspended by contractual provisions of Section IX contained in the same ordinance of June 13, 1930.

XVIII

The court erred in holding in effect that Section IX is not too vague and obscure to be enforcible, and in holding that its meaning is susceptible of ascertainment.

XIX

The court erred in holding Section IX applicable to the period of time from December 1, 1933 to February 16, 1934.

XX

The court erred in holding that Section IX is applicable to the case at bar, notwithstanding the decree of December 1, 1933 of the Court in Arkansas was not based on, and the court did not enter into the merits of the rates in that case.

[fol. 247] XXI

The court erred in holding that Section IX is applicable to the facts in the case at bar notwithstanding the rates in Arkansas were not legally or lawfully changed at any time after May 8, 1923.

XXII

The court erred in holding that Section IX is applicable regardless of the fact that defendant under the intent of said Section has not since June 13, 1930 been finally compelled to and has not voluntarily placed into effect any rates in Texarkana, Arkansas less than the rates prescribed in the ordinance of June 13, 1930 in Texarkana, Texas.

XXIII

The court erred in holding that Section IX is applicable notwithstanding defendant made application and exhausted all administrative remedies open to it to secure relief from confiscatory rates.

XXIV

The court erred in holding Section VIII-A of the ordinance of June 13, 1930 to be valid.

XXV

The court erred in rejecting without a hearing defendant's allegations that Section VIII-A, even if valid, has been waived by the action of the City Council in calling upon defendant to go through complete rate hearings, and in having full hearings; and in rejecting defendant's alle- [fol. 248] gations that the existing rates or any less rates were confiscatory and defendant entitled to disregard them.

XXVI

The Court after holding all questions as to Section VIII-A to have become moot since the filing of this suit, erred in rejecting without a hearing defendant's allegations that the existing or any less rates were confiscatory and defendant entitled to disregard them.

XXVII

The court erred in striking out defendant's counterclaims as a matter of law because this deprived defendant of hearing upon the cause of action set forth in said counterclaims.

XXVIII

The court erred in rejecting without a hearing defendant's allegations that the order of the City Council of Texarkana, Texas dated January 23, 1934 rejecting application for increased rates and the Section V rates amount to confiscation of defendant's property in Texarkana, Texas, and erred in rejecting without a hearing the allegations that defendant was entitled to relief from Section V rates and any lower rates.

XXIX

The court erred in rejecting defendant's allegations that defendant after pursuit of the administrative remedies was

entitled to a judicial hearing in the court below upon its allegations that enforcement of the Arkansas rates in Texarkana, Texas for the period of time from December 1, [fol. 249] 1933 to February 16, 1934 would be confiscatory of defendant's property in the city of Texarkana, Texas and that defendant was not properly limited to said rates.

XXX

Each of the foregoing errors are separately and severally assigned to case No. 106; and each one is also separately and severally assigned as to case No. 109; and defendant prays that the court enter an order to such effect.

Wherefore, defendant prays that the said decree be reversed, that plaintiff's bill be dismissed, and that the case be remanded with instructions to the District Court to proceed to a hearing on defendant's counterclaims, for costs and such other and further relief, general and special in law and in equity as may be proper.

John J. King, H. C. Walker, Jr., W. C. Fitzhugh, W. H. Arnold, Jr., Attorneys for Defendant, Arkansas Louisiana Gas Company, Appellant.

Copy received 9-16-37. Ed B. Levee, Jr., B. E. Carter, Attorneys for City of Texarkana, Texas.

[File endorsement omitted.]

[fols. 250-251] Supersedeas bond on appeal for $5,000.00, approved and filed September 23, 1937, omitted in printing.

[fol. 252] IN UNITED STATES DISTRICT COURT

Nos. 106 and 109, in Equity, Consolidated Cases

[Title omitted]

ORDER GRANTING APPEAL—Filed September 23, 1937

This day came on to be heard defendant, Arkansas Louisiana Gas Company, on its petition for appeal from the decree in the above entitled and numbered causes as consolidated

to the United States Circuit Court of Appeals for the Fifth Circuit, together with an assignment of errors, having moved for an order to be made providing that the record on appeal be made to include all papers in both No. 106 and 109 In Equity as consolidated to constitute the record [fol. 253] for both cases on appeal and fixing the amount of security which defendant should give and furnish upon said appeal, and having moved that a supersedeas be granted and all further proceedings in this court be suspended and stayed until a final determination of this appeal; the court finds that said petition for appeal should be granted as prayed.

It is Therefore Ordered that Arkansas Louisiana Gas Company, defendant in the above entitled cause, be, and it is hereby granted an appeal from the final decree in this cause, as consolidated, to the United States Circuit Court of Appeals for the First Circuit.

That the record on appeal shall include all proceedings and papers in both No. 106 and No. 109 In Equity, and as consolidated, and such record is to constitute the record on appeal in both cases and as consolidated.

That upon said defendant, Arkansas Louisiana Gas Company, filing with the Clerk of this court a good and sufficient bond in the amount of $5,000.00, to the effect that if the said defendant shall prosecute said appeal to effect and answer all damages and costs and shall make good refunds which may be due if it fails to make its plea good, then the said obligation to be void, otherwise to be and remain in full force and effect, the said bond to be approved by this court, that all further proceedings in this court be, [fols. 254-255] and they hereby are suspended and stayed until the final determination of said appeal.

This the 23 day of September, 1937.

Randolph Bryant, Judge.

O. K. as to form: Ed. B. Levee, Jr., B. E. Carter, Attys. for City of Texarkana, Tex.

Citation, in usual form, showing service on Ed. B. Levee, Jr., filed September 23, 1937, omitted in printing.

[fol. 256] IN UNITED STATES DISTRICT COURT

No. 106 and No. 109, in Equity, Consolidated

[Title omitted]

PRAECIPE FOR TRANSCRIPT—Filed September 23, 1937

To Marjorie Minton, United States District Clerk:

Kindly prepare, under Equity Rule 76, Record for Appeal to include the following, avoiding the inclusion of more than one copy of the same paper and excluding the formal and immaterial parts of each instruments:

Case No. 106

1. November 16, 1933. Plaintiff's Original Petition including:

Exhibit "A": Ordinance of June 13, 1930 and acceptance of ordinance by Southern Cities Distributing Company.

[fol. 257] Exhibit "B": Notice and Application of Southern Cities Distributing Company for Change and Modification of Rates.

2. November 16, 1933. Order that clerk issue Writ of Injunction as prayed for, signed by R. H. Harvey, Bowie District Judge.

3. November 16, 1933. Writ of Injunction, issued November 16, 1933 and filed November 23, 1933. Do not include the petition quoted in said writ, refer to Item 1 above. Include Sheriff's return.

4. November 18, 1933. Do not copy Citation, state: "Citation issued November 16, 1933, served November 18, 1933 and filed November 23, 1933."

5. November 22, 1933. Do not copy Notice, state: "Notice of Petition and Bond for Removal to the Federal Court dated November 21, 1933 was acknowledged by plaintiff November 22, 1933."

6. November 22, 1933. Petition for Removal and Bond filed November 22, 1933 by Southern Cities Distributing Company, and Order of Removal dated November 24, 1933.

7. November 22, 1933. Show: "Transcript was filed in the District Court of the United States for the Eastern District of Texas, Texarkana Division on December 20, 1933."

Do not copy Notice, Bill of Cost, or Transcript on Removal.

8. December 20, 1933. Defendant's Answer and Cross-action.

9. January 15, 1934. Amended and Substituted Bill in Equity filed by City of Texarkana, Texas, including:

[fol. 258] Exhibit "A". Ordinance of March 13, 1923.

Exhibit "B". Ordinance of June 13, 1930 and acceptance. Do not copy, refer to Exhibit "A" of the Original Petition, Item 1.

Exhibit "C". Notice and Application of Southern Cities Distributing Company for Change and Modification of Rates. Do not copy, refer to Exhibit "B" of plaintiff's Original Petition, Item 1.

Exhibit "D". Decree of December 1, 1933 United States District Court for the Western District of Arkansas.

10. March 9, 1934. Defendant's Answer to Amended and Substituted Bill in Equity, and Amended and Substituted Answer and Amended and Substituted Cross Bill and Counterclaim.

11. September 24, 1934. Plaintiff's Motion to Strike out answer and counterclaim of Southern Cities Distributing Company.

12. January 18, 1935. Motion to record change of name of Southern Cities Distributing Company to Arkansas Louisiana Gas Company.

13. January 18, 1935. Order that the name of Arkansas Louisiana Gas Company be substituted in all proceedings herein in lieu of Southern Cities Distributing Company; and that the style of the cause be changed to: "City of Texarkana, Texas v. Arkansas Louisiana Gas Company."

14. September 18, 1935. Order of Consolidation. Do not copy; state:

[fol. 259] "The order is that Case No. 106 and Case No. 109 consolidated; and that plaintiff's motion to strike out the answer and counterclaim of defendant in Case No. 109 In Equity be considered as going to and applying also to defendant's answer of counterclaim in Case No. 106."

15. December 30, 1936. Supplemental Bill of City of Texarkana, Texas, including:

Exhibit "1". Decree of December 4, 1936 of the United States District Court for the Western District of Arkansas.

Exhibit "2". Order of December 16, 1933 of the United States District Court for the Western District of Arkansas.

16. July 14, 1937. Separate Amended Answer of Defendant, Arkansas Louisiana Gas Company, to Plaintiff's Original and Supplemental Petition: and Counterclaim of Arkansas Louisiana Gas Company.

17. July 19, 1937. Motion that defendant's pleading filed July 14, 1934 be recognized and ordered applicable to both cases.

18. July 19, 1937. Order recognizing defendant's pleadfiled July 14, 1937 and ordering that it be taken to apply as defendant's additional pleadings in both cases 106 and 109 In Equity.

19. July 19, 1937. Motion of plaintiff to strike "Separate Amended Answer of defendant, Arkansas Louisiana Gas Company to plaintiff's Original and Supplemental Petition: and Counterclaim of Arkansas Louisiana Gas Company." [fol. 260] 20. July 30, 1937. Final Decree.

21. September —, 1937. Petition for Appeal, Assignments of Errors, Bond, Order Granting Appeal, Citation in Appeal, Service, this Praecipe, and Clerk's Certificate.

Case No. 109

22. May 23, 1934. Petition of Texarkana, Texas vs. Southern Cities Distributing Company and others, including:

Exhibit "A". Ordinance of March 13, 1923. Do not copy, refer to Exhibit "A" of plaintiff's Amended and Substituted Bill in Equity in Case 106, Item 9.

Exhibit "B". Ordinance of June 13, 1930 and acceptance by Southern Cities Distributing Company. Do not copy, refer to Exhibit "A" of plaintiff's Original Petition in Case 106, Item 1.

Exhibit "C". Notice and Application of Southern Cities Distributing Company for Change and Modification of Rates. Do not copy, refer to Exhibit "B" of paintiff's Original Petition in Case 106, Item 1.

Exhibit "D". Resolution of January 23, 1934.

Exhibit "E". Decree of December 1, 1933. Do not copy, refer to Exhibit "D" in Item 9.

23. May 23, 1934. Do not copy Citation, state: "Citation issued May 23, 1934, was served on the same day."

24. June 11, 1934. Answer of Defendants Railroad Commission of Texas filed in Bowie District Court.

[fol. 261] 25. June 1, 1934. Do not copy Notice of Removal, state: "Notice of Removal to the Federal Court was duly given on June 1, 1934."

26. June 2, 1934. Petition and Bond for Removal, filed June 2, 1934; Amended Petition for Removal, filed June 11, 1934.

27. June 11, 1934. Order of June 11, 1934 Bowie District Court overruling Petition for Removal.

28. June 13, 1934. Do not copy Transcript, state: "Transcript of the record of Bowie District Court was on June 13, 1934 filed in the United States District Court for the Eastern District of Texas, Texarkana Division."

29. June 13, 1934. Petition to Federal Court for Removal and for an order restraining plaintiff from proceeding in the state court.

30. June 13, 1934. Plaintiff's Motion to Remand.

31. June 13, 1934. United States District Court Order removing cause to the Federal Court, overruling motion to remand, and enjoining plaintiff from further proceeding in the Bowie District Court in said suit.

32. July 12, 1934. Answer and Counterclaim of Southern Cities Distributing Company.

33. September 24, 1934. Plaintiff's motion to strike out said answer and counterclaim. Do not copy, refer to Item 11 above.

34. January 18, 1935. Motion to Record Change of Name of said defendants to Arkansas Louisiana Gas Company.

[fol. 262] 35. January 18, 1935. Order substituting the name of Arkansas Louisiana Gas Company in lieu of Southern Cities Distributing Company and changing the style of cause to: "City of Texarkana, Texas vs. Arkansas Louisiana Gas Company and Lon A. Smith, C. V. Terrell and Ernest O. Thompson, Members of the Railroad Commission of Texas."

36. September 18, 1935. Order of Consolidation. Do not copy, refer to Item 14 above.

37. December 30, 1936. Supplemental Bill of City of Texarkana, Texas. Do not copy, refer to Item 15 above.

38. July 14, 1937. Separate Amended Answer of defendant, Arkansas Louisiana Gas Company to plaintiff's Original and Supplemental Petition, and Counterclaim of

Arkansas Louisiana Gas Company. Do not copy, refer to Item 16 above.

39. July 19, 1937. Motion that defendant's pleading filed July 14, 1934 be recognized and ordered applicable to both cases. Do not copy, refer to Item 17 above.

40. July 19, 1937. Order recognizing defendant's pleading filed July 14, 1937 and ordering that it be taken to apply as defendant's additional pleadings in both cases 106 and 109 In Equity. Do not copy, refer to Item 18 above.

41. July 19, 1937. Motion of plaintiff to strike "Separate Amended Answer of Defendant, Arkansas Louisiana Gas Company to Plaintiff's Original and Supplemental Petition: [fol. 263] and Counterclaim of Arkansas Louisiana Gas Company." Do not copy, refer to Item 19 above.

42. July 30, 1937. Final Decree. Do not copy, refer to Item 20 above.

43. September —, 1937. Notice, Motion for Summons and Severence, Order of Severence.

44. September —, 1937. Petition for Appeal, Assignments of Errors, Bond, Order Granting Appeal, Citation in Appeal, Service, this Praecipe. Do not copy, refer to Item 21 above.

45. September —, 1937. Certificate. Make Clerk's Certificate as to this case.

This September 23, 1937.

John J. King, H. C. Walker, Jr., W. C. Fitzhugh, W. H. Arnold, Jr., Attorneys for Defendant, Arkansas Louisiana Gas Company.

Receipt acknowledged of a copy of the above praecipe and service thereof waived this the 22nd day of September, 1937.

City of Texarkana, Texas, by Ed. B. Levee, Jr., B. E. Carter, Its Attorneys.

[File endorsement omitted.]

[Fol. 264] In District Court of Bowie County, Texas, Fifth Judicial District

No. 109. In Equity

Plaintiff's Original Petition—Filed May 23rd, 1934

To the Honorable Judge of Said Court:

Now comes the City of Texarkana, Texas, a municipal corporation, chartered and incorporated under and by virtue of the laws of the State of Texas, situated in the County of Bowie, State of Texas, hereinafter called plaintiff, complaining of the Southern Cities Distributing Company, a corporation duly incorporated and doing business in the City of Texarkana, Bowie County, Texas, and owning and operating a natural gas distributing plant through a system of pipes over and under the streets and alleys of the City of Texarkana, Texas, and selling natural gas to the inhabitants of said City for household and commercial purposes, and of Lon A. Smith, C. V. Terrell and Ernest O. Thompson, who are the members of the Railroad Commission of the State of Texas, hereinafter styled defendants, and for cause of action plaintiff represents to the Court:

1.

The City of Texarkana, Texas, is a municipal corporation organized under a special act of the State Legislature which was passed on November 2, 1905. It brings this suit on [fol. 265] its own behalf and also as the representative of and as trustee for all the consumers of natural gas in said City.

The Southern Cities Distributing Company is a corporation and is the owner of a franchise, hereinafter described, for the distribution of natural gas in the City of Texarkana, Texas, and owns and operates a natural gas distributing plant in said City.

The defendants, Lon A. Smith, C. V. Terrell and Ernest O. Thompson are the members of the Railroad Commission of Texas.

On March 13, 1923, the City Council of the City of Texarkana, Texas, passed an ordinance, at the request of the Southwestern Gas and Electric Company, which then owned the natural gas distributing franchise in said City, amending said franchise and granting to said Company an increase in rates; a copy of said franchise of 1923 is hereto attached,

marked Exhibit A, and made a part hereof and referred to herein as such.

Thereafter, in 1928, said Southwestern Gas and Electric Company transferred its franchise to the present defendant the Southern Cities Distributing Company.

In 1930, the Southern Cities Distributing Company applied to the City Council for an increase in rates and after a hearing the Council rejected this application and said Southern Cities Distributing Company then appealed to the Railroad Commission of Texas and said Commission came to Texarkana and conducted hearings on said application on [fol. 266] May 28 and 29, 1930. While the hearings were going on and while testimony was being taken before said Commission the Company proposed to the City Council a compromise of said rate controversy, said compromise granting it certain increases in rates, and said compromise was then and there agreed upon between the Southern Cities Distributing Company and the City of Texarkana, Texas. The hearing before the Commission was thereupon discontinued and no findings were made and no order was entered by the Commission. The Council passed an ordinance in the nature of a franchise agreement, as authorized by Sections 160 to 164, 196 of said special act of 1905, which was the City Charter, setting up the terms of said compromise agreement. After publication as required by law, this ordinance was passed and approved on June 13, 1930, and the Southern Cities Distributing Company accepted the same and agreed to the terms thereof by an instrument in writing dated June 17, 1930, and filed with the City Secretary of the said City on June 18, 1930; a copy of this ordinance, together with the writing accepting and agreeing to the terms thereof, is hereto attached as Exhibit "B," made a part hereof and referred to herein as such.

By reason of such acceptance of said franchise with all its terms and conditions and by reason of the fact that the Southern Cities Distributing Company has since enjoyed the benefits thereof, said franchise became a binding agreement and said Southern Cities Distributing Company became bound thereby to the City of Texarkana, Texas, and [fol. 267] the consumers of gas therein to carry out the terms of said agreement and to supply gas under the rates and terms and conditions therein granted, established, accepted and agreed to and said company is now estopped from attacking any of the terms and conditions therein con-

tained and from changing or attempting to change the rates therein set forth.

Plaintiff especially pleads Section VIII-A of said franchise agreement, which is as follows:

"Section VIII-A. In consideration of the granting of this franchise, it is mutually agreed and understood by and between the parties hereto that before the City Council of said City shall apply for a reduction in rates, or before the Southern Cities Distributing Company, its successors or assigns, shall make application for an increase in rates, either party shall give to the other party one year's notice in writing of its intention to so apply for an increase or decrease in rates, and no application for increase or decrease in rates shall be acted upon or considered unless said one year's notice is first given before making such application."

Said franchise agreement has not been amended, modified or repealed, nor has any attempt been made to amend, modify or repeal said agreement in any manner.

The Southern Cities Distributing Company did on the 3rd day of November, 1933, file with the City Secretary an instrument in writing styled "Notice and Application of Southern Cities Distributing Company for Change and Modification of Rates to Go Into Immediate Effect." A [fol. 268] copy of said notice is hereto attached, marked Exhibit C and made a part hereof and referred to as such.

Notwithstanding Section VIII-A of said franchise agreement the Southern Cities Distributing Company stated in its notice aforesaid that it would place the proposed increased rates into effect on November 23rd, 1933.

The plaintiff says that said notice that increased rates would be placed into effect on November 23rd, 1933, and the attempt of the said Southern Cities Distributing Company to place same in effect was in violation of Section VIII-A of said franchise agreement.

On the 4th day of November, 1933, the defendant Southern Cities Distributing Company filed with the City Secretary of the plaintiff City an instrument in writing as follows:

"Texarkana, Texas,
November 2nd, 1933.

"To the Honorable Mayor and Members of the City Council of the City of Texarkana, Texas:

"You are hereby notified pursuant to the terms of a certain franchise, dated June 13, 1930, that the grantee therein,

Southern Cities Distributing Company, will apply for an increase in rates one year after date of giving this notice.

"This notice contemplated an application for an increase in rates over such rates as have been applied for pursuant to the application of said grantee, Southern Cities Distributing [fol. 269] Company, now pending, for an immediate increase in rates upon which Southern Cities Distributing Company is requesting and will seek prompt hearing and action.

"Southern Cities Distributing Company, by Paul F. McBride, General Manager."

"Filed: G. D. Garrett, City Secretary, November 4, 1933."

Thereafter, on November 14, 1933, the City Council passed a resolution in which it recited that, without waiving any of its rights under said franchise agreement, it was willing, if proper information be submitted to it, to consider the question whether the provisions of said franchise contract were oppressive and whether it should waive the same, and calling upon said Southern Cities Distributing Company to furnish certain information from which the Council could determine said question. Thereafter, certain information was filed with the Council and the Council met on January 22, 1934, and considered said information and also considered the evidence then submitted orally by the Southern Cities Distributing Company and also the evidence of an expert accountant employed by the City to advise it, and having heard the same the Council thereupon passed a resolution denying said application for an increase in rates and making certain findings, which may be summarized as follows:

[fol. 270] A. That the Council had not waived the provisions of the franchise contract providing for one year's notice before any application for an increase in rates should be heard and that the Council had entered into the hearing and had considered the evidence solely for the purpose of determining whether or not the facts were such as should cause the Council to consider such provision of the franchise contract to be so oppressive that the Council should consent to waive the same.

B. That on the basis of the evidence submitted a rate of forty-five cents (45¢) net per thousand cubic feet for domes-

tic gas was in excess of all the compensation due the Distributing Company and the pipe line company, including depreciation and a fair return upon the value of its property, and that the Council could not find that the franchise provision for a year's notice was oppressive and that the Council could find no reason for waiving the same.

C. That no evidence had been submitted from which the Council could find that the present rates did not fully compensate the Company.

The Council thereupon declined to waive the franchise provision for one year's notice and ordered that the Company should not put the proposed increased rates into effect.

A copy of this resolution of January 23, 1934, is hereto attached as Exhibit D, made a part hereof and referred to herein as such.

[fol. 271] Thereafter, in violation of said provision of its franchise hereinabove quoted and in violation of its agreement and contract to supply gas to the consumers in the City of Texarkana, Texas, under the rates, terms and conditions set up in said franchise the defendant, the Southern Cities Distributing Company, filed with the Railroad Commission of the State of Texas on March 5, 1934, an appeal from the said refusal of the City Council, in which appeal it asked the Railroad Commission of Texas to set aside the order of the Council refusing to grant it an increased rate and asking that the Railroad Commission establish and fix the rates which had been applied for by said Company. It also asked the Railroad Commission to grant it a temporary increase in rates under bond.

On March 12, 1934, the Railroad Commission of Texas made an order allowing said appeal on condition that the Company be required to give good and sufficient bond in the sum of ten thousand dollars ($10,000.00). Said order provided that upon the filing and approval of said bond the action of the Council should be suspended and superseded. The plaintiff says that the said bond has never been posted by the said Southern Cities Distributing Company.

The plaintiff says that said Section VIII-A of said franchise agreement constitutes a valid and binding waiver by the Southern Cities Distributing Company of any right it may have under the Statutes of the State of Texas to secure

an increase in rates except upon the terms and conditions [fol. 272] prescribed in said franchise agreement, to-wit, upon the giving of one year's notice before any such increase should be applied for; that the attempt of the Southern Cities Distributing Company to secure an increase by an appeal to the Railroad Commission under the facts above stated is in violation of said franchise agreement; and that said Company having waived its right to secure increased rates except after giving one year's notice of its intention to apply for same the said Railroad Commission is without jurisdiction and is without power to relieve the Company from its contract to supply gas at the rates prescribed in said franchise agreement and that the plaintiff is entitled to an injunction restraining the Southern Cities Distributing Company from proceeding with said appeal and restraining the defendants, the members of the said Railroad Commission, from entertaining said appeal and from hearing the same and from taking any action thereon and from taking any action with reference to gas rates in the City of Texarkana, Texas, until after said Southern Cities Distributing Company has complied with the provisions of the said franchise agreement calling for one year's notice.

The plaintiff in this section of its petition, as well as in the other parts of this petition, is suing not only for its own benefit as a consumer of gas but is suing as the representative of and as trustee for and for the use and benefit of all the gas consumers in the City of Texarkana, Texas. These consumers are very numerous there being more than thirty-[fol. 273] five hundred (3,500) of them, and it is impracticable to bring them all before the Court. The claim of the City and of all these gas consumers as set forth in this section is based upon the same facts and arises out of the same contract provisions and said consumers, as a whole, constitute a class, all of whom have the same rights against the defendant and this plaintiff is the proper representative of all such consumers. The Statutes of the State of Texas confer upon this plaintiff, as such representative, the right to make franchise contracts for the distribution of gas and the rates at which it should be distributed.

Under such powers and as the representative of such consumers, the City entered into the franchise agreement and contract with the Southwestern Gas and Electric Company dated March 13, 1923, a copy of which has been heretofore

set forth as an exhibit to this petition. Said Franchise of 1923 provided, in part, as follows:

"Article E: It is further understood between the said Southwestern Gas & Electric Company, its successors and assigns, and the City of Texarkana, Texas, that the said Southwestern Gas & Electric Company shall not at any time charge for furnishing gas either to domestic or industrial consumers in the City of Texarkana, Texas, a greater sum or charge than it at the same time charges and collects from like consumers for similar service in the City of Texarkana, Arkansas."

[fol. 274] Thereafter, as hereinbefore set out, said franchise was transferred by said Southwestern Gas and Electric Company to the defendant in this case, the Southern Cities Distriubting Company. The franchise agreement entered into between the City and the said defendant on June 13, 1930, and accepted and agreed to by the defendant as heretofore described, a copy of which franchise and which acceptance and agreement have been heretofore made a part of this petition, contained the *the* following provision:

"Section IX. If Grantee shall be finally compelled to, or should voluntarily, place in any rates in the City of Texarkana, Arkansas, less than the rates granted by this Ordinance, then and thereupon the lessened rate shall apply in the City of Texarkana, Texas, and Grantee shall not be authorized or permitted to charge and collect any higher rate."

The plaintiff says that said provision of said franchise of 1923 and said provision of said franchise of 1930 were accepted and agreed to by the grantees of said franchises in both cases, in consideration of the agreement on the part of the City that certain increased rates should be collected. Any said agreements, more especially the agreement contained in the franchise of 1930, are valid and binding contracts on the part of the defendant. Said provision is a just and proper provision to prevent discrimination against the gas consumers in the City of Texarkana, Texas. The City of Texarkana, Texas, and the City of Texarkana, Arkansas, are one community, being separated only by a state line. [fol. 275] The natural gas distributing plant owned by the Southern Cities Distributing Company serves both cities;

consumers in Texarkana, Arkansas, are served from identically the same mains as consumers in Texarkana, Texas, and all of the gas which supplies both cities is purchased at the town borders of Texarkana, Texas, from the Arkansas and Louisiana Pipe Line Company, a company all of whose stock, except the qualifying shares of directors, is owned by the Arkansas Natural Gas Corporation, which corporation also owns all of the stock of the Southern Cities Distributing Company, the defendant in this case. Said provision in said franchise does not waive any of the rate regulating powers conferred upon the City Council by the Statutes of the State of Texas, and it is a just and proper provision to prevent discrimination against the consumers in Texarkana, Texas. Said agreement was within the corporate powers of the Southern Cities Distributing Company. Its predecessor in title made such agreement in 1923 as one of the considerations to induce the City to grant increased rates a- that time without a contest or controversy in the Courts. The present defendant made such agreement in 1930 as one of the considerations to induce the City to enter into a compromise agreement with it granting increased rates at a time when a controversy over such increased rates was being actually contested before the Texas Railroad Commission. Said agreement is a valid and binding agreement. The defendant [fol. 276] proposed such agreement to the City Council and has been exercising and enjoying the privileges conferred upon it therein.

At the time said compromise agreement was made, a similar compromise agreement was entered into between the Southern Cities Distributing Company and the City of Texarkana, Arkansas, whereby the same rates agreed to in Texas were to be placed in effect in Texarkana, Arkansas. Referendum petitions against such compromise agreement were at once circulated in Texarkana, Arkansas, and given a great deal of publicity in the newspapers. These petitions were circulated and this publicity took place prior to the action of the Council on June 13, 1930, in passing said franchise ordinance. It was then contemplated by both parties that said compromise agreement in Arkansas might be upset by means of said referendum petitions, and said Section IX of said franchise agreement was designed to take care of the situation in the event said compromise agreement should be upset in Texarkana, Arkansas.

Thereafter, as a result of said referendum petitions, said compromise agreement was upset, rejected, nullified and set aside as to Texarkana, Arkansas. The constitution of that State provides that any measure against which a referendum petition is filed shall remain in abeyance until the election is held. Because of litigation said referendum election was not held until May 28th, 1932, at which time said compromise agreement was overwhelmingly rejected. On the same day, to-wit, May 28th, 1932, the Southern Cities Dis- [fol. 277] tributing Company filed a suit in the United States District Court in Arkansas to prevent the referendum election from having any effect. This suit has been finally decided and on December 1, 1933, the United States District Court for the Western District of Arkansas entered its final decree in said matter, a copy of which decree is hereto attached, marked Exhibit E and made a part hereof and referred to herein as such.

This decree orders, among other things, the following:

1. That on and after December 1, 1933, the Southern Cities Distributing Company should supply gas to the consumers in Texarkana, Arkansas, at the old rates which were in effect prior to said compromise agreement of May, 1930, which old rates are the same as those set forth in the franchise agreement of 1923 between the City of Texarkana, Texas, and the Southwestern Gas and Electric Company, a copy of which has been heretofore made a part of this petition, and which were the same rates which were in effect in Texarkana, Texas, prior to the compromise agreement of May, 1930, as embodied in said franchise of June 13, 1930. Said Southern Cities Distributing Company has complied with said order of the Federal District Court and supplied gas to the consumers in the City of Texarkana, Arkansas, at said old and lower rates until February, 16, 1934, when it obtained a temporary injunction against such rates in a case now pending and not yet tried.

[fol. 278] In violation of Section IX of its franchise agreement said defendant failed and refused to put said lower rates in effect in Texarkana, Texas, and continued to charge its consumers in Texarkana, Texas at the higher rates provided for in said compromise agreement. The City Council called upon the defendant to comply with said Section IX of its franchise agreement and to place in effect in Texarkana, Texas, the lower rates which it charged in Texarkana,

Arkansas, until February 16, 1934, and called upon it to stop and desist from discriminating against the gas consumers of Texarkana, Texas; and said defendant failed and refused to stop the discrimination and failed and refused to comply with its franchise agreement and is still continuing to charge and exact from the consumers of gas in Texarkana, Texas, the higher rates provided in its franchise agreement of June, 1930, which rates are higher than those which it collected in Texarkana, Arkansas, until February 16, 1934.

2. Said decree of December 1, 1933, in the United States District Court for the Western District, also determined that the collection by the defendant of the rates provided in said compromise agreement of May, 1930, from the time when said rates were placed in effect in June, 1930, down to and including its collections up to December 1, 1933, were unlawful and illegal insofar as the rates exceeded those in effect in said City prior to May, 1930, and said Court ordered said defendant to make refunds to all of its consumers in [fol. 279] Texarkana, Arkansas, of the difference between the amounts actually collected by it under the rates provided in said compromise agreement and the amounts which it should have collected under the rates which were lawfully in effect, which rates the Court found and determined to be the rates which were in effect prior to said compromise agreement and which this plaintiff alleges to be the rates set up in the franchise of March, 1923, which has been heretofore made an Exhibit to this petition.

The plaintiff says that the consumers of gas in the City of Texarkana, Texas, are entitled to an order from this Court directing said Southern Cities Distributing Company to at once place in effect in the City of Texarkana, Texas, the lower rates provided in the franchise of 1923, and that such consumers are further entitled to an order and judgment from this Court directing the defendant to make refunds to such consumers for the excess collected by said Company from the time said increased rates were put into effect in June, 1930, down to February 16, 1934, over and above the amount which was due to said Company under the rates provided in said franchise agreement of 1923. The plaintiff says that said decree of the United States District Court in Arkansas compelled the defendant to place in effect in Texarkana, Arkansas, as of May 30th, 1930, rates less than the rates shown in the franchise agreement of

June 13th, 1930, between this plaintiff and this defendant, [fol. 280] and that said franchise agreement provides that if said defendant is compelled to place any such lower rates in effect in Texarkana, Arkansas, that the lesser rates shall apply in the City of Texarkana, Texas.

The plaintiff says further that it has received from numerous gas consumers in the City of Texarkana, Texas, assignments to the plaintiff of a part of such refunds as may be due them and that such assignments were granted to the City for the purpose of paying the expenses of this litigation and for the purpose of paying the expenses of the present controversy now pending as to increased rates, and that it would be unfair and unjust to this plaintiff to permit the defendant to defeat its right to recover under such assignments by any offsets which it might claim against such refunds arising on and after the date of the filing of this petition.

The plaintiff says that it and the gas consumers of the City of Texarkana, Texas, are without any adequate remedy at law and that unless restrained the defendant, Southern Cities Distributing Company, will prosecute its appeal before the Railroad Commission of the State of Texas, and will place into effect rates in excess of those provided for in said franchise agreement and that the members of the said Railroad Commission will proceed with the hearing of said Appeal and to the plaintiff's damage in the sum of fifty thousand dollars ($50,000.00).

[fol. 281] Premises considered, the plaintiff, for its own use and benefit, and as the representative of and as trustee for all of the consumers of gas in the City of Texarkana, Texas, and for the use and benefit of all such gas consumers, prays:

1. That the Court set this application down for hearing upon such notice as may be required by law and that upon such hearing the Court grant its most gracious writ of injunction restraining the Southern Cities Distributing Company from putting into effect any increase in rates in the City of Texarkana, Texas, except after having given one year's notice of its intention to apply for such increase and from putting any increased rates into effect at any time or in any other manner except at the time and in the manner provided in said franchise agreement and restraining it

from prosecuting and from taking any further steps in its appeal which has been lodged before the Railroad Commission of Texas and restraining the individual defendants who are the members of the said Railroad Commission of Texas from proceeding with said appeal and from taking any steps to grant an increase in rates to the Southern Cities Distributing Company in Texarkana, Texas, except upon the terms and after the notice agreed to by said company in said franchise agreement, and should enjoin the defendant, Southern Cities Distributing Company, from raising and from attempting to raise and from taking any steps before the Railroad Commission or before the Courts in an at-[fol. 282] tempt to raise its rates in violation of said Section VIII-A of said franchise agreement.

2. That the Southern Cities Distributing Company be ordered and directed to comply with Section IX of its franchise agreement and to at once place in effect in the City of Texarkana, Texas, the rates for gas which it was compelled to place in effect in the City of Texarkana Arkansas, by said decree of December 1, 1933, of the United States District Court of the Western District of Arkansas. If, for any reason, the Court should find that the defendant should be permitted to continue to charge its present rates pending the determination of said rate litigation now pending as to the rates in Texarkana, Arkansas, then the Court should permit the defendant to continue to charge its present rates only upon condition that it give bond in a sum to be fixed by the Court, conditioned that in the event it is not successful in maintaining the rates which it is now collecting under a temporary restraining order in Texarkana, Arkansas, and is compelled to make refunds down to the basis of a lower rate, then that the Company should also make refunds to its consumers in the City of Texarkana, Texas, down to the basis of such lower rates.

3. That the defendant be ordered and directed to file with the Clerk of the Court, and to deliver a copy to this plaintiff, a statement under oath showing all monies collected by it from its consumers in Texarkana, Texas, under the rates provided in said franchise agreement of June 13, 1930, from [fol. 283] the time said rates were first put into effect down to and including all collections under such rates down to February 16, 1934, and shall show as to each of such con-

sumers the name and address of each consumer, the amount of gas supplied each month from each consumer under such rates and the amount which would have been due from each consumer under the rates of the franchise of 1923, and the difference for each month between the amount so collected and the amounts which would have been due under such 1923 rates, and that the Court should order said defendant to pay into the registry of this Court at the time such statement is filed the total excess between the amount so collected and the amount so due, without any deducting for any effect, setoff or counterclaims of any kind whatsoever, plus all the fees, costs and commission to which the Clerk of the Court may be entitled for paying out such monies to the persons who may be then entitled to receive the same; that the plaintiff and each of the gas consumers be afforded excess to the books and records of the company for the purpose of checking such statement, and that they may be permitted such time as may be reasonable within which to call any errors in such statement to the attention of the Court.

4. For judgment for all its costs in and about this suit expended and for all other necessary or proper relief.

Ed B. Levee, Jr., City Attorney, Ben E. Carter, Attorneys for Plaintiff.

[fol. 284] *Duly sworn to by Ed. B. Levee, Jr. Jurat omitted in printing.*

Exhibit "A" not copied as it is the same as Exhibit "A" in Item 9.

Exhibit "B" not copied as it is the same as Exhibit "A" in Item 1.

Exhibit "C" not copied as it is the same as Exhibit "B" in Item 1.

[fol. 285] EXHIBIT "D" TO PETITION

Resolution

Be it Resolved by the City Council of the City of Texarkana, Texas:

The Council finds that on November 3, 1933, the Southern Cities Distributing Company filed with the City Secretary

an instrument in writing styled "Notice and Application of the Southern Cities Distributing Company for Change and Modification of Rates to go into Immediate Effect." Said Company stated in said notice that it would place the proposed increased rates into effect on November 23, 1933. On June 13, 1930, the City Council of this City passed an Ordinance in the nature of a franchise contract, whereby it granted certain increased rates to the Southern Cities Distributing Company and in consideration of said grant said company made certain contracts with the City. This franchise contract was accepted and agreed to by said Southern Cities Distributing Company by an instrument in writing dated June 17, 1930, and filed with the City Secretary on June 18th, 1930.

Said franchise contract contained among other provisions an agreement on the part of said Southern Cities Distributing Company, which was set forth in Section VIII-A, that before the Southern Cities Distributing Company, its successors or assigns should thereafter make an application for an increase in rates it should give to the City one year's notice in writing of its intention to so apply for an increase [fol. 286] in rates and that no application for an increase in rates shall be acted upon or considered unless said one year's notice be first given.

Thereafter, on November 4th, 1933, said Southern Cities Distributing Company filed with the City Secretary its motion for a preliminary hearing and action on its application, in which motion it alleged that it was being subjected to daily confiscation and asked the Council for an immediate hearing.

Thereafter, on the 14th day of November, 1933, the City Council passed a resolution in which it recited that it was willing, if proper information be submitted to it, but without waiving any of its rights under said franchise contract, to consider the question whether the provisions of said contract were oppressive or unjust and whether it should waive the same and calling upon said Southern Cities Distributing Company to furnish the proper information from which the Council would determine said question.

In partial compliance with said demand of the Council the Southern Cities Distributing Company has filed certain information with the Council.

The Council also finds that by agreements entered into between the Southern Cities Distributing Company and the City attorney, the time for said hearing has been extended from time to time and that the Council met and heard the evidence introduced by the parties on January 22nd, 1934, [fol. 287] and having heard all the evidence, does hereby make the following findings with reference to the question as to whether it should waive the provisions of said franchise agreement and consent to consider an application for increased rates without said one year's notice and with reference to the propriety of the increased rates and charges proposed by the company and the Council does adopt and make the order hereinafter set out with reference to said application.

Findings

The Council in consenting to hear said application and in considering the evidence submitted, has not waived the provisions of said franchise contract providing that no application for an increased rate should be considered except after one year's notice, but has at all times insisted on the same and has entered into this hearing and has considered said evidence for the purpose of determining whether or not the facts as to the earnings and expenses of said Southern Cities Distributing Company are such as should cause the Council to consider the provisions of said franchise agreement to be so oppressive that the Council should in equity and good conscience consent to waive the same.

The Southern Cities Distributing Company, hereinafter referred to as Gas Company, buys its gas at the City gate of Texarkana, Texas, from the Arkansas Louisiana Pipe Line Company, which company, together with the Reserve [fol. 288] National Gas Corporation, either produces all of said gas, or purchases a part of the same from independent companies, and transports the same through pipe lines to the City gate where the same is delivered and sold to the Gas Company. The Arkansas Louisiana Pipe Line Company and the Reserve Natural Gas Corporation are hereinafter referred to as the Pipe Line Companies. Both the local gas company and also both of said pipe line companies are owned and controlled by the Arkansas Natural Gas Corporation. The Arkansas Natural Gas Corporation in turn is substantially owned and is actually controlled by the Cities Service Company. The Cities Service Company is

managed and for all practical purposes is controlled by Henry L. Doherty, doing business as Henry L. Doherty & Company.

The first item which the Council has considered in determining whether the proposed rates and charges are just and reasonable, is the cost to said Pipe Line Companies of the gas which they deliver to the City gate at Texarkana for sale to the local gas Company and distribution by it. The testimony offered on behalf of the Gas Company indicates that the total annual operating expenses for the year 1930 of the Pipe Line Companies, not including depreciation, return on investment and the amount claimed for Federal income tax on such rate, is $4,098,670.11, included in this total *is* the cost of gas is produced and the amortization of the cost of the gas wells, and also the expenses incurred in the operation and maint*ain*ence of said production properties, including severance taxes and royalties and taxes on the [fol. 289] gas producing properties and the general expenses of producing such gas. Said total also included all costs chargeable for gas purchased. Said cost also include the total cost of transporting gas from all of the wells of the companies, and from all of the points at which the same is purchased to all of the points at which said pipe line companies deliver gas for sale to all persons, including local distributing companies and all customers served by the Pipe Line Companies off of their own lines; including the operation and maintenance of compressor stations and the general expenses connected with the operation, maintenance, and supervision of said transportation properties. Said total also includes all of the total taxes paid on said transportation system and properties. Said total expenses claimed by the company also includes all other taxes paid by it of every kind whatsoever except federal income taxes, none of which were actually paid by any of the companies involved in this matter within the period covered by the evidence offered. Said total also includes all expenses claimed by the Company in exploring and searching for gas. The Council finds that said figure of $4,098,670.11 includes all of the costs and expenses of every kind and description claimed by the company as the cost of producing, purchasing and transporting gas to all of the points on its pipe line system where it delivers gas, excepting depreciation and return on its investment, and that there is included in this amount the amortization charges claimed to be necessary by the com-

[fol. 290] pany to reimburse it for the cost of its gas producing property of every kind.

The Council finds that no evidence has been presented to it from which it can find that the following items of expense are fair or just or reasonable or proper charges against the consumers of gas and that they should not be included in the expense of the Pipe Line Companies which are chargeable against the present consumers of gas from said companies.

(a) In 1930 the Pipe Line Companies paid to Henry L. Doherty & Company the sum of $51,587.86 under a management contract, copy of which has been introduced in evidence. Similar payments were made in 1931 and 1932. This contract provides in general terms for the rendering of certain services by Henry L. Doherty & Company under this contract, and the witnesses for the Company have testified that they have no information as to the cost to Henry L. Doherty & Company of any service which might have been rendered by it. The Council therefore finds that this item included in the total of expenses has not been justified and that there is not therefore any basis upon which the Council should find that the same should be allowed as a part of the expenses to be charged against the consumers.

(b) In 1930 the Pipe Line Companies paid for rentals on non-producing gas leases, the sum of $66,042.50, and same is included in the operating expenses charged by the Com-
[fol. 291] panies. The evidence indicates that these leases are wildcat leases and that they are so denominated upon the evidence submitted by the Company. They are not presently used or useful in the production of gas for the present consumers of the companies. A considerable part of them are located in Mississippi, more than 100 miles away from the nearest pipe line of these companies. The testimony of the Company indicates that the pipe line system is now far from completed. It also indicated that the Company has reserves of gas under its present producing leases which are adequate to supply its present requirements for approximately five (5) years. The Council can not find under the evidence, that these wildcat leases are now in use as a part of the gas producing properties of the Pipe Line Companies, or that said properties are at this time either used or useful to any of the present customers of the Companies. They were acquired and are being held for the use

of customers whom the Companies hope to serve at least five (5) years in the future, and the Council finds that the cost of carrying these properties, same being the rentals included in this item, should be carried by the Companies and charged against the consumers who may eventually use them in the event they become used and useful.

(c) The Companies have included in their expense an item of $63,666.28 for the amortization of the cost of non-producing leases. The Council finds from the evidence that [fol. 292] the costs here referred to do not relate to the cost of leases which have been drilled and proven to be non-productive, but that they are the cost of acquiring the wildcat acreage above referred to. The Council finds that this item should be treated in the same manner as the rentals on non-producing leases above considered and that the same are not costs incurred in connection with property now used or useful to the present consumers of gas and that the same should not be included in the operating expenses charged against the present consumers.

(d) The Company claims as an item of expense the sum of $24,191.47 on account of bad debts and adjustments. The Council finds that $24,000.00 of this item is an accrual on the books for bad debts and that the actual debts charged off were $22,264.47, and that the excess of the amount accrued over the amount actually charged off, amounting to $1,735.53, is not properly chargeable as an expense against the consumers and should not be allowed.

After these items of expense, which the Company has not justified, have been deducted from the expenses charged by it for the year 1930, there remains the sum of $3,947,247.21 which the Council finds is apparently justified as the total expenses to the Pipe Line Companies for the year 1930 for producing and purchasing and transporting all gas handled by it to all points of distribution on its system and that this [fol. 293] sum includes amortization of all of the costs of its gas producing properties.

Annual Charge for Depreciation

The Company claims that it should be allowed an annual amount for the depreciation of its transmission and general property, not including production property the cost of which is amortized through the expense accounts of the Com-

pany as above set forth, in the sum of $1,306,629.08, which the Company claims should be charged against the cost of the gas distributed by it. This depreciation charge is at the rate of five (5) per cent per annum on all the claimed value of the transportation and general property of the Pipe Line Companies amounting to $26,132,581.53. As to this claim the Council finds first that the rate of depreciation upon which it is based is not justified by the evidence which has been offered.

The engineers of the Company who inspected the transportation properties of the Pipe Line Companies for it to ascertain its condition per cent, testified that more than 60% of the transportation property was constructed within the last five years and that the condition per cent of this property was 98%, and that if it were properly maintained it might be there for one hundred years or forever. The total depreciation deducted by the Company from the cost of reproduction new of its entire property, determined by it after an actual inspection by its own engineers, amounts to between 11 and 12 per cent of the cost of reproduction new. [fol. 294] Approximately 40 per cent of the properties are considerably more than five years old. The Council finds that the annual amount charged by the Pipe Line Companies on their books for depreciation for the year 1932 was $836,932.00, and that the annual charges on the books during the three years covered by this investigation averaged $929,800.00 per year. For the Arkansas Louisiana Pipe Line Company the average annual net charges against the depreciation reserve amount to $224,987.00. The net balance now remaining in the replacement reserve of the two companies as accumulated on their books amounts to $9,159,969.00, which sum amounts to approximately thirty-one (31) per cent of the value claimed by the Company for all of the depreciable property owned by it. The plant investment account carried on the books of the two Pipe Line Companies amounts to $33,659,162.00. Included in this plant investment account are $5,500,000.00 for an item of gas rights which the witnesses for the Company did not know anything about, except that they were not now in existence, and an item of $2,000,000.00 classified as "suspended" which no witness for the Company knew anything about. There is also included in the plant investment account the sum of $486,531.00 as dry-well drilling expense, which the Company now claims should be allowed to it in its expense accounts.

When these items are deducted from the present investment account on the books of the Company, there remains the sum of $25,672,631.90, which represents the book value [fol. 295] of the properties as far as it can be ascertained on the books. The net amount remaining in the depreciation reserve on the books of the Company, as above pointed out, amounts to $9,159,659.00.

In consideration of the evidence which has been presented before the Council concerning the experience of the Company as to depreciation, it finds that a higher rate for the annual depreciation charge than two per cent (2%) has not been justified and that two per cent (2%) would be an ample and liberal allowance insofar as shown by the evidence before the Council. The amount of this allowance is $482,651.63, same being two per cent (2%) upon the value of the depreciable property as hereinafter found.

Included in the items of expense claimed by the Company, and not stricken out by the Council as being unjustified on the basis of the evidence presented to it, is a considerable amount of expense items charged to the Pipe Line Companies by the Arkansas Natural Gas Corporation. There was some testimony as to the general nature of the services performed by the Arkansas Natural Gas Corporation. This Corporation, besides owning these gas properties, owns a controlling interest in and manages a considerable number of other properties including companies engaged in the production, refining and marketing of oils, gasoline, lubricating oils and also a company engaged in the distribution of automobile tires. The witnesses offered by the Gas Company in this case testified that they did not know the basis on [fol. 296] which these expense items were allocated by the Arkansas Natural Gas Corporation to its various subsidiary companies. There is no evidence whatever in the record as to what method was used to apportion the costs to the subsidiary companies and there is no evidence from which the Council could find that the expense items allocated against these gas properties represent either the cost or the proper proportion of the cost to the Arkansas Natural Gas Corporation of the services, materials, supplies or other basis upon which these charges were made. The Council has not, however, deducted these costs so allocated to the gas properties on some basis unknown to the witnesses, because these items are indefinite and incapable of

determination from the evidence. They represent, however, a considerable item of expense which has been allowed to remain in the expenses claimed by the Companies but which have not been justified by any evidence before the Council.

Rate Base

The Pipe Line Company claims that the present fair value of the property upon which it is entitled to earn a return is $36,616,007.84.

Aside from the facts above recited as to the plant investment account shown on the books of the Company there is no evidence in the record as to the original cost to date of the properties of the Pipe Line Companies. The testimony of the Gas Company was that the plant investment account referred to did not accurately reflect the original cost of [fol. 297] construction. This account is said to include items taken over from the books of predecessor companies and also to include additions to the properties since 1928.

The figure claimed by the Company for its rate base represents what it claims to be the cost of now reproducing the pipe line properties less accrued depreciation determined by an actual inspection of the properties to determine their condition per cent. The engineer who made this investigation testified that he inspected the pipe lines at some four hundred places. The pipe lines thus inspected are over 96 miles long. The engineer testified that he inspected approximately six to eight feet at each of the four hundred points of inspection.

This engineer testified that he gave no consideration whatever to the expired service life of the property, or to the anticipated future service life, but did base his estimate of condition per cent upon the appearance of the pipe inspected by him and whether it was pitted or not.

The gas producing properties, including the operated leases, and the gas wells thereon and the materials in the wells were not depreciated at all. The producing leases were included in the rate base by the Company at a figure said to represent their actual cost. The wells on these producing leases were included in the valuation at a figure said to represent their cost of reproduction new. Neither of these items was depreciated or depleted. Some of these [fol. 298] wells have been producing gas for many years

and the testimony shows that some of them are nearing complete exhaustion and that some of them are completely exhausted every year. The Council finds that a well which is nearing exhaustion does not have the same value as a new well drawing gas from undepleted reserves. The Company claims in its exhibits an expense item for the amortization of the cost of drilling and equipping these gas wells. The total so claimed for the years 1930, 1931, and 1932 as such expense item amounts to $734,882.00. In comparing this expense item claimed for the last three years with the cost of reproduction new of the gas wells claimed by the Company at the figure of $1,523,306.48, the Council finds that the claim of the Company that the present value of these gas wells is as great as the cost of reproduction new is not justified and cannot be sustained.

In determining the rate base the Council has included these wells at the present value claimed by the Company, which is the reproduction cost new, because the evidence does not show the basis on which this item should be depreciated but the Council finds that this property is included at considerably more than its present value and that it should be depreciated.

While the Council finds that the present value claimed by the Company is not, for the reasons above set forth, fully justified and that the Company has not discharged the burden of proving the present fair value of its properties upon which it claims a return, and while the Council finds that [fol. 299] the value so claimed by the Company is excessive, nevertheless the Council adopts this value as the maximum value upon which the return should be calculated.

There are included, however, in the rate base claimed by the Company certain specific items which the Council finds have not been justified at all by the evidence offered before it and which must be stricken out in determining the fair value of the property. These items are the sum of $986,725.05 as being the actual cost of non-producing leases. These are the leases designated on the exhibits of the Company as wildcat acreage. The rentals on these leases have been heretofore discussed. These leases are not now used or useful in supplying gas to the present consumers of the Company and a return upon their value or cost can not be included in the value of the property upon which the consumers should be forced to pay a return upon the theory

that it is now used or useful in performing any service to them.

There is also included an item of $2,000,000.00 as present value of contractor's profit on labor in the construction of the transportation system. It is testified that this item represents 20% of the labor costs. The Council finds that if any such item is property included in the rate base at all the amount of this item is at least twice as much as contractors profits figured in this part of the country at the present time. The Council finds, however, that the Company has included in other items all of the costs of superintendence, supervision, engineering, accounting, purchas-
[fol. 300] ing and other services such as are rendered by the contractors, and that an allowance of any separate amount for contractor's profit would duplicate other cost items already included in the rate base and that this item should be struck out in its entirety. The witnesses for the Company testified that their cost of reproduction new was based upon the unit cost system and that the unit cost system included all of the items of cost of the property in place, reflecting the cost of reproducing the property as it existed on the date of the inventory. In addition to those unit costs, which according to the Company's testimony, represented the cost of the property in place, the Company has claimed an item of over $4,000,000.00 as representing the cost of the engineering overhead. The Council therefore finds that the evidence submitted to it does not justify the inclusion of a separate item of $2,000,000.00 representing contractor's profits and that this item should not be included in the rate base.

There has also been included in the rate base claimed by the company the sum of $4,267,120.80 for what is denominated as "going concern value."

The witnesses for the company testified that this amount consisted principally of depreciation and interest on idle plant after it was built and before consumers could be attached to it and also consisted of the cost of training men to operate the plant. They also included taxes on the plant during the time it was idle along with the depreciation and interest. The testimony reflects that by far the largest part [fol. 301] of this plant was built after contracts had been secured for certain gas delivery and was built for the express purpose of meeting the requirements of these con-

tracts and that this property did not have any such period of idleness as is called for in the testimony of the Company's witnesses. Over sixty per cent of the plant was built after the latter part of 1928 and the greatest amount of gas distributed by the company occurred in January, 1930, and the witnesses for the Company testified that the load reached the theoretical capacity of the plant at that time. This Company is and has been since the time of its organization a large operating unit with a great number of trained men in its own ranks. There is no evidence on which the Council should find that this company ever did or ever would go out and hire untrained personnel to operate its properties and the cost of training an operating personnel is not a cost which has been incurred in the construction of this plant. In addition to that, any expenses which have been incurred in training employees have been charged as operating expenses and presumably returned to the Company through expenses in the past, just as the cost of training new men at the present time is now being charged through the operating expenses of the Company. In addition to the fact that the Council has not placed a scrap value upon this property and has valued it as a going plant, the Council has included other elements for a going concern value by including in the value claimed for the rate base the full cost of producing leases claimed by the Company [fol. 302] without any depreciation and the full value claimed by the Company for the cost of reproduction new of its gas wells without any depreciation, both of which values, as has been heretofore pointed out, are largely in excess of the actual present value of these two classes of property. In allowing full value claimed for these items, the Council has considered the item of going concern value for the property as a whole.

In placing a value upon the plant of the Company, the plant is valued as a going concern and not at its junk or scrap or salvaged value. The compressor stations which are included in the value at a large figure would have no value except a comparatively small junk or scrap value except for the Pipe lines which connect them and which also *connect* with the producing gas wells and with the consumer. The pipe lines, which have been included in the value at a very large figure, would have only a comparatively small scrap value if it were not for the gas wells at one end and

the customers at the other. The producing leases and the gas wells which have been included in the value at a large figure would have almost no value at all if it were not for the pipe lines which — them with the consumers. In the valuation placed upon the property it has been valued as a going concern and an allowance for going concern value is included in the value which has been allowed. The specific item claimed by the Company for going concern value, comprising the matters above discussed, has been disallowed on the ground that none of the matters discussed [fol. 303] was an item of expense incurred in connection with the construction of this property.

The Company claims that there should be included in its rate base the sum of $1,404,382.06 for working capital. The Council finds that the maximum amount which can be reasonable included for working capital is the sum of $500,000.00. On the December, 1932, balance sheet submitted by the Pipe Line Companies, the total amount of customers' accounts receivable, of stores and supplies, and of cash, and accounts receivable from affiliated companies, amounted to $358,634.16. The Council finds that this was the actual working capital upon which the Pipe Line Companies were operated in December, 1932.

The Council also finds that the total 1932 expenses of the two Pipe Line Companies were approximately $3,000,000.00. A reasonable allowance for working capital would be the expenses for a period of somewhere between forty-five and sixty days, certainly not to exceed sixty days. The expenses for a forty-five day period would be $373,000.00. The expenses for a sixty day period would be $500,000.00 This is the maximum working capital upon which the pipe line company should be allowed to charge a return against the consumer. When it is compared with the actual working capital which was employed in December, 1932, the Council find that an allowance of $500,000.00 for working capital is the maximum which should be included in the rate base.

[fol. 304] The Company also claims that there should be included in the rate base the sum of $1,123,505.65 for the cost of financing. As the Council understands the evidence, this item represents the costs that the Company considers will be necessary to induce bankers to finance the construction of the property, or to interest capital to advance the

funds necessary to construct the property. If the base value considered is the present value, that value must be measured by money and the cost of obtaining money is immaterial. The company is entitled to a fair return on the capital which it shall prudently invest in the enterprise and no more. This cost of financing is claimed on the theory that a company desiring to build such a plant as this would come here penniless or without sufficient capital to pay for the plant and would be compelled to incur certain costs in order to interest capital in the enterprise and in order to float securities to pay for it. The Council finds that the value of the plant, if the theory of reproduction cost new is to be used, should be determined upon the theory that it would be built by those able to build it and that they would pay reasonable prices for it. The Council also finds that this item has been held to be an improper item for inclusion in the rate base by the United States Supreme Court in the case of Galveston Electric Company v. Galveston, 258 U. S. 388, and also by other Federal Courts. In the face of these decisions the Council can not find any justi- [fol. 305] fication for including it in the value upon which the company should be allowed to earn a return from the customer.

Summary of Rate Base

After the adjustments above set forth have been made on the value claimed by the Company as the basis on which it should be allowed to earn a return, the Council finds that the fair value of all of the property of the Pipe Line Companies now used and useful in supplying gas to the present customers of the Pipe Line Companies is not in excess of the sum of $27,334,274.28.

Rate of Return

The company claims that it should be allowed to earn a rate of return amounting to at least eight per cent (8%) upon the value of its transmission and general property and ten per cent (10%) on its production property.

The Council takes judicial knowledge of the business conditions which have prevailed in this section of the country during the last four years and it also knows that few businesses in this section of the country which are exposed to competition, and which do not enjoy monopoly, and which

are exposed to the risks of falling and rising prices, have been able to earn any return at all since 1929. The Council also takes judicial knowledge of the fact that very few businesses of any character and very few investments of [fol. 306] any character in this section of the country have earned anywhere near as much as six per cent (6%) on the money invested.

In considering what should be a fair rate of return, consideration must be given to the fact that this Pipe line property was designed and constructed to produce and transport a considerably larger amount of gas than is now being produced and transported. The company's witnesses testified that the peak load in January, 1930, was the theoretical capacity of the plant. This load amounted to 168,912 m. c. f. The peak load in 1933 came in the first part of February and amounted to 139,143 m. c. f. The witnesses for the company also testified that most of the sixty per cent (60%) of the plant which had been built since 1928, was built mainly to meet the requirements of certain industrial gas contracts which they had before the lines were built. The figures submitted by the Company show that the industrial peak load in 1930 was 83,614 m. c. f., and that the industrial peak load in 1933 was 38,348 m. c. f.

It also appears that the total gas distributed by the Pipe Line system in 1930 was 55,681,572 m. c. f., that the total for the year 1932 was 43,380,345 m. c. f., and that the total for the first six months of 1933 was 21,463,189 m. c. f. The fact that some customers ceased using gas and that others used less gas than they formerly did does not increase the value of the service rendered to those customers who are still using gas. These remaining customers are being re- [fol. 307] quired to pay all of the operating expenses and all of the depreciation on the value of the plant, both of which expenses should be spread over the greater number of customers for whose benefit the plant was designed and built. There would appear to be no justification for asking these remaining customers to pay a rate of return greater than the lowest reasonable rate.

The council therefore finds that under the present depressed and abnormal conditions when the earnings of the best organized and best financed concerns of the country are decreased and when many of them are not earning operating expenses, and when the present consumers are be-

ing asked to pay a return upon the full value of a plant designed and capable of serving a far larger consumption than is now being served, which plant was largely built to meet the requirements of industrial contracts, which the evidence of the company shows have in a large part temporarily evaporated, that a rate of return in excess of six per cent (6%) would be exorbitant and excessive and unfair to the consumers of the Company.

The testimony of the witnesses also shows that the Company is getting its money for six per cent (6%). The evidence of the Company also indicates that its business is developed to the point where it can no longer be classed as a hazardous or risky business. The figures with reference to the plant investment account of the Pipe Line Companies and the amounts which they have accumulated for surplus and replacement reserves on their books have already been [fol. 308] cited and these records indicate that the surplus and reserves amount to almost one-third of the amount invested.

Under the evidence submitted in this case, the Council can find no justification for allowing a greater rate of return than six per cent (6%).

Applying this rate of return to the rate base as found by the Council of $27,334,274.28, the maximum amount which the Company should be allowed to earn as a fair rate of return on the value of its property is $1,640,056.46.

As was stated at the beginning of those findings, most of the figures as to expenses hereinabove set forth were for the year 1930; similar evidence has been introduced as to the expenses for the years 1931, 1932 and they have been similarly considered by the Council, and the Council has reached as to them similar results.

As a result of the consideration of the evidence submitted by the Company and as a result of the adjustments in the expenses, valuations and returns claimed by the Company, the Council finds that the total fair, just and reasonable expense of the Pipe Line Companies, including depreciation and a return on the rate base, incurred in the cost of producing, purchasing and transporting gas to all the points on its system were not in excess of the following amounts:

For the Year 1930	$6,069,955.30
For the Year 1931	5,526,123.30
For the Year 1932	5,114,377.13

[fol. 309] Southern Cities Distributing Company

The local Gas Company claims that the total cost to it of serving its customers in Texarkana, Texas, was as follows:

For the Year 1930	$396,330.54
For the Year 1931	363,140.79
For the Year 1932	327,087.46

Included in these totals were certain items for rate case expense incurred in connection with the rate controversy which has been decided adversely to the claims of the Gas Company. The Council finds that these items of expense are not properly chargeable against the consumers and should be stricken out. They are:

For the Year 1930	$7,917.91
For the Year 1931	1,659.06
For the Year 1932	1,944.32

There is also included in these totals as an item of expense the amount paid Henry L. Doherty & Company under contracts similar to that hereinbefore referred to, which items are as follows:

For the Year 1930	$5,377.52
For the Year 1931	5,366.21
For the Year 1932	4,575.07

There is no evidence in the record either as to the specific services rendered by Henry L. Doherty & Company and the witnesses for the Company did not know what it cost Henry L. Doherty & Company to render such services as [fol. 310] might have been performed. These items are therefore stricken out.

There is also included the cost of gas. The proper allowance for the cost of gas is hereinafter determined and added back and the Council therefore finds that in computing the proper expenses of the Company, aside from the cost of gas, this item should be stricken out. This leaves expense items, aside from the cost of gas, properly chargeable against the consumers, as follows:

For the Year 1930	$67,404.53
For the Year 1931	57,241.06
For the Year 1932	47,829.47

Included in these totals are a number of items allocated down to the Texarkana plant and then to the consumers in Texarkana, Texas, from the Southern Cities Distributing Company. This allocation was made on the basis of the number of meters. There is no evidence that this basis accurately reflects on has any necessary relation to the actual cost of rendering such services as may have been rendered to the consumers in Texarkana, Texas. In addition to this, the testimony of the Company's witnesses shows that a considerable part of these expense items had been allocated down to the Southern Cities Distributing Company from the Arkansas Natural Gas Corporation upon some basis unknown to the witnesses. The expenses which have been allowed, therefore, include a considerable amount which has not been justified by the evidence but the Council does not [fol. 311] strike them out because there is no evidence in the record upon which the Council can determine what is the proper basis of allocation.

To the expenses which have been above allowed there should be added the item of Bad Debts which is as follows:

For the Year 1930	$1,817.00
For the Year 1931	4,473.54
For the Year 1932	3,421.68

The cost of gas must also be added to the above expenses. The Council has heretofore set forth what it finds to be the total expense to the Pipe Line Companies for all their services incurred in supplying gas to all points on their systems, including depreciation and a return upon the fair value of their property. The Council finds that the fair and reasonable method of charging against the Texarkana, Texas, consumers their proportionate part of these total expenses of the Pipe Line Companies and the return upon their properties is in proportion to the total gas sold to domestic, commercial and industrial consumers in Texarkana, Texas, as compared with the total gas sold by said Pipe Line Companies to all consumers. These proportions are:

For the Year 1930	2.29427%
For the Year 1931	2.63562%
For the Year 1932	2.38220%

Applying these percentages to the total expenses, including a return, of the Pipe Line Companies shows the

[fol. 312] following amounts as the proper cost for gas delivered by the Pipe Line Companies to the Texarkana, Texas, distributing system:

For the Year 1930	$139,261.16
For the Year 1931	145,647.60
For the Year 1932	121,834.69

To the expenses and the cost of gas there must be added a fair allowance for the depreciation on the properties used and useful in supplying gas to the consumers in Texarkana, Texas, and a return upon the fair value of this property.

The Company claims that the rate base upon which it should be allowed to earn a return in Texarkana, Texas, is $518,252.37. Included in this is a specific item of $60,000.00 for Going Concern Value. This specific item the Council finds is not justified for reasons similar to that set forth under discussion of similar claim of the Pipe Line Companies. The Council has considered the fact that the property is a going concern connected with a source of gas at one end and with established customers at the other end, and has taken that item of value into consideration. The Council also finds that the land included in the value claimed by the company is in excess of its present value. The Council has allowed something for Going Concern Value in allowing these two items to remain in the rate base at the figure claimed by the Company. The Council also finds that included in the separate item for Going Concern Value claimed by the Company is the cost of connect-
[fol. 313] ing customers with the line. As a matter of history, this expense has been charged currently to operating expenses. The same is true as to the cost of training and organizing and the cost of developing the books and records which the company claims should be included in the item of Going Concern Value. In the actual experience of the Company the cost of maintaining an idle plant and the cost of taxes and interest has been absorbed in operating expenses and the Council takes knowledge of the fact from personal observation that the Texarkana, Texas, plant has been built piece-meal and that extensions have been made to meet demands.

There is also included by the Company in the rate base claimed by it the sum of $20,000.00 for the cost of financing.

This is excluded by the Council for the same reasons as set forth in the discussion of the Pipe Line Companies.

The exclusion of these items leaves a rate base of $438,252.37 which the Council finds is the maximum possible amount of the fair value of the property in Texarkana, Texas, upon which the Company is entitled to a return.

The depreciable items set forth in the cost of reproduction new, before the accrued depreciation is taken out, amount to $464,535.31. The Council finds, for the same reasons set forth under the discussion of the Pipe Line Companies, that the proper annual charge for the depreciation of this property is two per cent and that the annual charge [fol. 314] for depreciation is $9,290.71. Much of the property in the Texarkana, Texas, distributing plant was installed by the old artificial gas system prior to 1905. The engineers for the Company testified that the condition per cent of the property is better than 85%. The engineer inspected, at the time of the hearing, some mains which had been laid by the Southwestern Gas & Electric Company prior to the purchase of these properties in 1928 and found them to be in 98% condition.

The Council finds that a fair rate of the return upon the present maximum value of the property used and useful for distributing gas in Texarkana, Texas, is 6%, being the same rate of return found for the Pipe Line properties. This return applied to the maximum value of the rate base is $26,295.14.

When these items of Bad Debts, Depreciation, Return on Rate Base and Cost of Gas, as above determined, are added to the other expenses hereinabove set forth, they show that the total cost of the gas delivered by the Distributing Company to its customers in Texarkana, Texas, was as follows:

For the Year 1930	$244,068.54
For the Year 1931	242,948.05
For the Year 1932	208,671.69

In determining whether the rate applied for by the Company is a proper rate, the Council deducts from the above totals of the cost of gas delivered by the Distributing Company, including a return, the income from industrial sales, [fol. 315] the forfeited discounts and other income. The totals of these were as follows:

Fort the Year 1930	$112,896.31
For the Year 1931	110,105.10
For the Year 1932	80,593.04

These deductions leave the following amounts as the total of the costs and return which may be fairly charged against the domestic and commercial consumers in Texarkana, Texas:

For the Year 1930	$131,172.20
For the Year 1931	132,842.95
For the Year 1932	128,078.65

When these totals are divided by the total sales to domestic and commercial consumers they show that the total cost, including depreciation, return and all other costs of the gas sold by the Distributing Company to domestic and commercial consumers, were as follows:

For the Year 1930	30.789¢ per M. C. F.
For the Year 1931	33.546¢ per "
For the Year 1932	35.927¢ " "

The Council also finds that the average costs per M. C. F. of all gas sold by the Distributing Company in Texarkana, Texas, were as follows:

For the Year 1930	23.825¢ per M. C. F.
For the Year 1931	23.164¢ " "
For the Year 1932	25.935¢ " "

[fol. 316] These costs include not only all expenses actually incurred by the Pipe Line Companies and the Distributing Company in producing, purchasing and transporting this gas but they also include the depreciation on all the properties involved, a return upon the maximum fair value of the property used and useful in supplying such gas, and the amortization of the cost of the producing leases and of the cost of reproduction new of the gas wells from which the gas is obtained.

No allowance nas been made by the Council for Federal Income Taxes upon the returns claimed by the Pipe Line Companies and the Distributing Company. It is in evidence that no income taxes have been paid during any of the three years covered by the evidence offered to the Council. In this connection the Council points out that it called upon the

Gas Companies for information covering all these matters for five years prior to this date and that at the request of the Gas Companies it modified its request to cover only three years. These companies filed consolidated income tax returns with Arkansas Natural Gas Corporation, a Company which is engaged in many other lines of business besides producing and transporting gas. As a result of these affilations and the consolidated income tax returns filed in connection therewith, these gas properties have not paid any income taxes to the government nor have they been called upon to do so, nor is there any evidence that there is any immediate prospect that they will have to pay such taxes.

[fol. 317] The Council finds that there is no justification for calling upon the consumers to pay income taxes which the Companies themselves do not pay and it has not therefore made any allowance for the charge of such taxes against the consumers.

The Council finds that the Southern Cities Distributing Company is now collecting from its domestic and industrial consumers in Texarkana, Texas, the rates set up in the franchise contract entered into between the Company and the City in June, 1930, which rates are a minimum monthly rate of $1.00, which minimum is not subject to any discount and for which the consumer is entitled to receive one thousand feet of gas and that all gas consumed after the first thousand feet is charged for at the rate of fifty cents per thousand, which rate is subject to a discount of five per cent (5%), resulting in a net rate of forty-seven and one-half (.47½) cents per thousand cubic feet.

The Council finds that at no time covered by the information and evidence submitted to it by the Company was the cost to the company of the gas sold to domestic and commercial consumers in excess of 35.927 cents per thousand cubic feet which cost includes all expenses for producing and purchasing the gas and amortizing the cost of the leases from which it is produced and the cost of drilling and equipping the gas wells and also includes all of the costs and expenses incurred by the Pipe Line Companies in bringing the gas to Texarkana, including depreciation on their properties and a fair return upon the value of all of said [fol. 318] producing and transportation properties and also

includes all the expenses incurred in distributing the gas in Texarkana, including an allowance for depreciation upon the property used in such distribution and a fair return upon the value of such property.

The Council also finds that the legal rate which should be in effect in Texarkana, Texas, at the present time under the terms and provisions of the franchise agreement entered into in June, 1930, is fifty cents per thousand cubic feet, which return is subject to discount of ten per cent resulting in a net return of 45¢ per thousand cubic feet. Under the terms of said franchise agreement the Company bound itself to place in effect in Texarkana, Texas, any rate which it might be compelled to place in effect in Texarkana, Arkansas, and said company has been, by an order of the United States District Court for the Western District of Arkansas, compelled to place said forty-five cent rate in effect in Texarkana, Arkansas, and said rate is the one which said Company is bound under said franchise agreement to use in Texarkana, Texas. The Council finds that said forty-five cent rate is in excess of the cost, including depreciation and return, of supplying gas to the domestic and commercial consumers in Texarkana, Texas.

The Council finds, therefore, that no reason exists for finding that the provisions of the franchise contract, whereby the Company agreed that no application on its part for an increase in rates should be heard or determined until after [fol. 319] one year's notice are oppressive or unjust and that no reason exists why the Council should waive said agreement on the part of the Council and the Council finds that it should not waive said agreement.

The Council finds further that if there was no such agreement, the Company has not submitted evidence from which the Council could find that the rates now being collected by the Company do not fully compensate it for all the services performed by it for its consumers in Texarkana, Texas, or, from which the council could find that the present legal rate of forty-five cents net is not a fair and just and reasonable rate or could find that said rate does not fully compensate said company for all its expenses or that said rate does not allow to said Company more than a fair rate upon the full value of its properties, in addition to paying all of said expenses and paying for the depreciation on the property used in rendering said service.

The Council finds that an order should be made directing the Gas Company not to put the proposed increased rates into effect and forbidding them from doing so.

Order

Now, therefore, be it further resolved by the City Council of the City of Texarkana, Texas:

1. That the Council refuses to waive and still insists upon the provision of the franchise agreement entered into in June, 1930, wherein the Southern Cities Distributing Com- [fol. 320] pany agreed that no application for increased rates on its part should be heard or determined until after one year's notice. The City Attorney is ordered and directed to pursue and insist upon his application now pending in the Courts for an injunction to secure the specific performance of said franchise agreement.

2. That the rates for gas contained and set forth in the "Notice and Application of the Southern Cities Distributing Company for Change and Modification of Rates to go into Immediate Effect" filed with the City Clerk on November 3, 1933, are unjust and unreasonable and are exorbitant and improper rates and would result in an even greater and more unjust discrimination against the consumers of gas of Texarkana, Texas than are the rates which said company is now collecting in violation and in disregard of its franchise agreement to give to its consumers in this City the benefit of any rates it is compelled to place in effect in Texarkana, Arkansas, and said Southern Cities Distributing Company is forbidden to put such proposed new rates into effect and is ordered and directed not to put such rates into effect.

3. The City Attorney is ordered and directed to continue and to insist upon his application now pending in the Courts for an order directing said Company to comply with its franchise agreement and to place in effect in Texarkana, Texas, [fol. 321] the rates which it has been compelled to place in effect in Texarkana, Arkansas, same being the net rate of forty-five cents per thousand cubic feet hereinabove referred to, which rate the Council finds from the evidence which has been submitted to it by the Company is a rate more than sufficient to return to said Company all of its costs and expenses in supplying gas to the domestic and commer-

cial consumers and in addition thereto it provides a reasonable allowance for depreciation and pays to said Company more than a fair rate of return upon the reasonable and fair value of all of the property used and useful in rendering such services to said consumers.

4. The City of Texarkana, Texas, hereby notifies the Southern Cities Distributing Company that it will one year from this date enter upon a hearing for the purpose of determining whether or not the rate for domestic and commercial consumers should not be reduced to forty cents per thousand cubic feet or less. This notice shall not be construed as a waiver of any right on the part of the City to insist that if in the meanwhile a lower rate than the present rate now in effect in Texarkana, Arkansas, is put into effect in that City, said Company shall at once place said lower rate in effect in Texarkana, Texas, as it obligated itself to do in said franchise agreement of June, 1930.

Nothing herein shall be construed to be waived upon the part of the City of the right granted to it in said franchise [fol. 322] agreement to receive free gas for its use at the municipal building, jail and fire stations.

Passed and approved this the 23rd day of January, A. D. 1934.

(Signed) R. C. Cowan, Mayor.

Attested: (Signed) G. D. Garrett, City Secretary. (Seal of City of Texarkana, Texas.)

Exhibit "E" is not copied as it is the same as Exhibit "D" in Item 9 above.

[File endorsement omitted.]

CITATION ISSUED MAY 23, 1934

Do not copy Citation, state: "Citation issued May 23, 1934, was served on the same day."

[fol. 323] IN DISTRICT COURT OF BOWIE COUNTY, TEXAS, FIFTH JUDICIAL DISTRICT

No. 19771

CITY OF TEXARKANA

vs.

SOUTHERN CITIES DISTRIBUTING COMPANY et al.

ANSWER OF DEFENDANT, RAILROAD COMMISSION OF TEXAS—Filed June 11th, 1934

To the Honorable Judge of said Court:

Come now the Railroad Commission of Texas, and the members thereof, Lon A. Smith, Chairman, E. O. Thompson and C. V. Terrell, being the duly elected and qualified members at this time serving as the Railroad Commission of Texas, acting by and through James V. Allred, the duly elected and qualified Attorney General of the State of Texas, as defendants in the above entitled and numbered cause, and for answer herein say:

I

That defendants demur and except to plaintiffs' original petition and say that such petition states no cause of action as against them; that such petition is wholly insufficient to require them to answer herein, and that same is without sanction either in law or in equity, and of this exception and demurrer they pray judgment of the Court.

II

Further answering, if same be necessary, these defendants show the Court that under Articles 6050 to 6066, inclusive, [fol. 324] Title 102, Revised Civil Statutes of 1925, the powers and duties of the Railroad Commission of Texas in the regulation of gas rates within the cities and towns of this State, and of the regulation of gas utilities operating within this state, are prescribed and defined; that particularly under Article 6058 are the duties of the Railroad Commission defined in requiring such Commission to hear and try any appeal from city control, where such appeal is

brought by the filing of proper petition and bond, in cases where a city government has ordered any existing rate to be reduced or when any city Government has failed or refused to grant an increase in rates after proper application on the part of the utility, requesting such raise in rates; that under the aforementioned statutes the Southern Cities Distributing Company filed with the Railroad Commission of Texas, on March 5, 1934, a petition purporting to be both an appeal from the refusal of the City Council of the City of Texarkana to grant an increase in rates and from the action of the City Council of the City of Texarkana in passing an ordinance reducing the existing rates; that thereafter on March 12, 1934, the Railroad Commission issued an order allowing such appeal on the condition that the said Southern Cities Distributing Company give a good and sufficient bond for the protection of the consumers of domestic gas within the City of Texarkana, Texas, in the sum of ten thousand ($10,000.00) dollars; said order provided further that upon the filing and approval of said [fol. 325] bond the action of the City Council should be suspended and superseded.

Defendants show that the requirement of the Railroad Commission as to the filing of a bond and the order of the Railroad Commission, setting the amount thereof, was in strict conformity to the provisions of Article 6058, and that said Article 6058 makes the filing of said bond in the amount and manner as required by the Railroad Commission a condition precedent to the perfection of the appeal, and without which no right exists for said utilities to require a hearing and decision by said Railroad Commission.

Defendants further show that no bond has ever been filed or posted by said Southern Cities Distributing Company with the Railroad Commission in its appeal relating to gas rates in the City of Texarkana, and that this being so, its appeal is not at this time perfected as before said Railroad Commission of Texas.

Defendants further show that the Railroad Commission of Texas stands ready at this time and will stand ready in the future at all times to hear the appeal of said Southern Cities Distributing Company, if and when such appeal may be perfected by the posting of a good and sufficient bond, if said bond be provided within a reasonable time.

Wherefore, defendants pray that this Honorable Court enter such order as may be necessary in the premises, but

in this regard respectfully pray that such order as may be directed to the Railroad Commission of Texas, or the [fol. 326] members thereof, will not restrain and enjoin them from properly functioning as a regulatory body of the State of Texas, upon the appeal now pending before them, as instituted by the Southern Cities Distributing Company, if and when such appeal is perfected by the filing of a proper bond, as required by the order heretofore issued by said Railroad Commission, if such bond be furnished within a reasonable time, and for such other and further relief, general and special, in law and in equity, to which the defendants may show themselves entitled.

James V. Allred, Attorney General of Texas. A. R. Stout, Assistant Attorney General. William C. Fitzhugh, Assistant Attorney General.

[File endorsement omitted.]

NOTICE OF REMOVAL FROM STATE COURT, ETC.

"Notice of Petition and Bond for Removal to Federal Court dated June 1st, 1934, was acknowledged by Plaintiff, on June 1st, 1934."

[fol. 327] IN DISTRICT COURT OF BOWIE COUNTY, TEXAS, FIFTH JUDICIAL DISTRICT

No. 19771

[Title omitted]

PETITION FOR REMOVAL—Filed June 2nd, 1934

To the Honorable Judge of said Court:

Now comes the defendant herein, Southern Cities Distributing Company, as petitioner in the above entitled cause, and respectfully shows to the Court:

1

That the above numbered and entitled suit has been brought in this court and is now pending therein.

2

That said action is of a civil nature, instituted by the City of Texarkana, Texas, as a municipal corporation of the State of Texas, by bringing into issue the legal construction of the franchise under which defendant, Southern Cities Distributing Company is operating within the limits of said City of Texarkana, Texas, and seeking by injunction to deny said defendant the right to apply for an increase [fol. 328] in the rates to be charged for gas within said city to said city and consumers therein, and the right to a hearing on appeal to the Railroad Commission of Texas of its application for an increase in rates, taken from an order of the City Council of the said City of Texarkana, Texas, denying such application, and bringing into issue an order or judgment of the United States District Court of the Western District of Arkansas, Texarkana Division, relating to rates chargeable for gas in the City of Texarkana in the State of Arkansas, and seeking a judgment of the said District Court for the Fifth Judicial District of Texas forcing the defendant, Southern Cities Distributing Company, to reduce its rates in Texarkana, Texas, to those heretofore in effect in Texarkana, Arkansas; and in which said plaintiff also seeks to enjoin the members of the said Texas Railroad Commission from hearing and passing upon the said appeal of said defendant; and in which other matters and issues are presented, and all of which more fully appear from the plaintiff's said complaint or bill, and which for the purpose of showing the character of the action by the plaintiff is made a part hereof by reference to the same extent as though fully copied herein.

3.

That the value of the matter in controversy, and especially as between said plaintiff and this defendant, in said action exceeds three thousand dollars ($3,000.00), exclusive of interests and costs.

[fol. 329] 4.

That the plaintiff's action, as a matter of fact and as shown by its allegations, involves a separable controversy as between it, a resident and citizen of the State of Texas, and the defendant, Southern Cities Distributing Company,

a resident and citizen of the State of Delaware, and is a controversy which is wholly between citizens of different states, and which can be fully determined as between them.

5.

That the plaintiff's action herein involves a controversy which is wholly between citizens of different states, in that the City of Texarkana, the plaintiff, is a municipal corporation and a body politic, incorporated under the laws of the State of Texas, wholly situated in said state, and was at the time of commencement of this suit in this court and still is a citizen of the state of Texas, and a resident of the County of Bowie in the Eastern Federal District of the State of Texas, Texarkana Division; and that your petitioner, Southern Cities Distributing Company, defendant herein, is a private corporation incorporated under the laws of the State of Delaware, with its principal office in said State in the City of Wilmington, and was at the time of the commencement of this suit and still is a citizen and resident of the State of Delaware, and was not and has not been a citizen and resident of the State of Texas.

[fol. 330] 6.

As an additional ground showing that this suit is removable and that the controversy as to this defendant is separable, defendant states that the members of the Railroad Commission are not proper parties in this suit and should be wholly disregarded in considering whether the suit is removable.

7.

As an additional ground showing that this suit is removable and that the controversy as to this defendant is separable, defendant states that this Court wholly lacks jurisdiction and venue over those defendants who are members of the Railroad Commission of Texas, and that this suit should be treated as if it were wholly between the City of Texarkana, Texas, and this defendant, Southern Cities Distributing Company.

8.

As an additional ground showing that this suit is removable and that the controversy as to this defendant is sep-

arable, defendant shows that no action whatever is stated against the defendants who are members of the Railroad Commission of Texas for the reason that the petition is insufficient as a matter of law as against those defendants.

9

That the plaintiff's action, as a matter of fact and as shown by its allegations, involves a federal question, in [fol. 331] that it involves the construction and application of the order and judgment made and entered as alleged in plaintiff's said complaint or bill by the United States District Court for the Western District of the State of Arkansas, Texarkana Division, in that it seeks to enforce same in Texarkana, Texas, by compelling said defendant to observe and comply therewith in making charges for gas in the City of Texarkana in the State of Texas, and thereby give to said order and judgment of said federal court extra territorial force, all as shown by the plaintiff's said complaint or bill, and which with reference thereto is made a part hereof as though fully copied herein.

10

That the time within which your petitioner, Southern Cities Distributing Company, defendant herein, is required by the laws of this state, and the rules of this court, to answer or plead to the declaration or petition of the plaintiff in the above entitled action, has not expired.

11

Your petitioner, defendant herein, presents herewith a bond with good and sufficient surety, conditioned that it will enter into the District Court of the United States for the Eastern District of Texas, Texarkana Division, within thirty days from the time of the filing of this petition and with said bond a certified copy of the record in this suit, [fol. 332] and that it will pay all costs that may be awarded by said United States District Court in case said court shall hold that suit was wrongfully or improperly removed thereto.

Wherefore, your petitioner prays that this court proceed no further herein, except to accept said surety and bond and by order cause the record herein to be removed into said

District Court of the United States within and for the Eastern District of Texas, Texarkana Division of said court, according to the statute in such cases made and provided.

Southern Cities Distributing Company, Petitioner, by H. C. Walker, Jr., and W. H. Arnold, Jr., Arnold & Arnold, King, Mahaffey, Wheeler & Bryson, its Attorneys.

Duly sworn to by Jno. J. King. Jurat omitted in printing.

[fol. 333] Bond on removal for $500.00, approved and filed June 2, 1934, omitted in printing.

[fol. 334] IN DISTRICT COURT OF BOWIE COUNTY, TEXAS, 5TH JUDICIAL DISTRICT

No. 19771

[Title omitted]

AMENDED PETITION FOR REMOVAL—Filed June 11, 1934

To the Honorable Judge of said Court:

Now comes Southern Cities Distributing Company, and with leave of the Court first had and obtained, files here- [fol. 335] with, in lieu of its original petition for removal filed on June 2nd, 1934, its Amended Petition for Removal, and respectfully states to the Court:

1

That the above numbered and entitled suit has been brought in this Court and is now pending therein.

2

That said action is of a civil nature, instituted by the City of Texarkana, Texas, as a municipal corporation of the State of Texas, by bringing into issue the legal construction of the franchise under which defendant, Southern Cities Distributing Company is operating within the limits of said City of Texarkana, Texas, and seeking by injunction

to deny said defendant the right to apply for an increase in the rates to be charged for gas within said city to said city and consumers therein, and the right to a hearing on appeal to the Railroad Commission of Texas of its application for an increase in rates, taken from an order of the City Council of the said City of Texarkana, Texas, denying such application, and bringing into issue an order or judgment of the United States District Court of the Western District of Arkansas, Texarkana Division, relating to rates chargeable for gas in the City of Texarkana in the State of Arkansas, and seeking a judgment of the said District Court for the Fifth Judicial District of Texas forcing the defendant, Southern Cities Distributing Company, to reduce its [fol. 336] rates in Texarkana, Texas, to those heretofore in effect in Texarkana, Arkansas; and in which said plaintiff also seeks to enjoin the members of the said Texas Railroad Commission from hearing and passing upon the said appeal of said defendant, and in which other matters and issues are presented, and all of which more fully appear from the plaintiff's said complaint or bill, and which for the purpose of showing the character of the action by the plaintiff is made a part hereof by reference to the same extent as though fully copied herein.

3

That the value of the matter in controversy, and especially as between said plaintiff and this defendant, in said action exceeds three thousand dollars ($3,000.00), exclusive of interest and costs.

4

That the plaintiff's action, as a matter of fact and as shown by its allegations, involves a separable controversy as between it, a resident and citizen of the State of Texas, and the defendant, Southern Cities Distributing Company, a resident and citizen of the State of Delaware, and is a controversy which is wholly between citizens of different states, and which can be fully determined as between them.

5

That the plaintiff's action herein involves a controversy which is wholly between citizens of different states, in that [fol. 337] the City of Texarkana, the plaintiff, is a municipal

corporation, and a body politic, incorporated under the laws of the State of Texas, wholly situated in said state, and was at the time of the commencement of this suit in this court and still is a citizen of the state of Texas, and a resident of the County of Bowie in the Eastern Federal District of the State of Texas, Texarkana Division; and that your petitioner, Southern Cities Distributing Company, defendant herein, is a private corporation incorporated under the laws of the State of Delaware, with its principal office in said State in the City of Wilmington, and was at the time of the commencement of this suit and still is a citizen and resident of the State of Delaware and was not and has not been a citizen and resident of the State of Texas.

6

As an additional ground showing that this suit is removable and that the controversy as to this defendant is separable, defendant states that the members of the Railroad Commission are not proper parties in this suit, and should be wholly disregarded in considering whether the suit is removable.

7

As an additional ground showing that this suit is removable and that the controversy as to this defendant is separable, defendant states that the members of the Railroad Commission are only nominal parties in this suit hav- [fol. 338] ing no real or substantial interest and should be wholly disregarded in considering whether the suit is removable. The members of the Railroad Commission, at most, have a representative or governmental interest only, and whatever should be the outcome of the suit, they would not be real parties substantially in interest.

8

As an additional ground that this suit is removable and that the controversy as to this defendant is separable, defendant states that the members of the Railroad Commission are not indispensable parties to this suit and should be wholly disregarded in considering whether the suit is removable. They are not necessary parties at all, even if it should be held that they are in any sense proper parties to this suit.

9

The Railroad Commission of Texas is a governmental agency in the same sense as the City and City Council and Officials of Texarkana, Texas. In considering whether the case is removable, the parties should be re-aligned so as to show the true situation; that is to say, if the Railroad Commissioners are proper parties in any sense they should be aligned with the plaintiff, the City of Texarkana, Texas. The members of the Railroad Commission of Texas, Lon A. Smith, C. V. Terrell and Ernest O. Thompson, are all residents and citizens of Austin, Travis County, Texas, and [fol. 339] were at the time this suit was filed and have been ever since.

10

Plaintiff states that the joinder of the members of the Railroad Commission of Texas was made fraudulently and for the sole and only purpose of undertaking to prevent a removal of this case.

11

As an additional ground showing that this suit is removable and that the controversy as to this defendant is separable, defendant states that this Court wholly lacks jurisdiction and venue over those defendants who are members of the Railroad Commission of Texas, and that this suit should be treated as if it were wholly between the City of Texarkana, Texas, and this defendant, Southern Cities Distributing Company.

12

As an additional ground showing that this suit is removable and that the controversy as to this defendant is separable, defendant shows that no action whatever is stated against the defendants who are members of the Railroad Commission of Texas for the reason that the petition is insufficient as a matter of law as against those defendants.

13

That the plaintiff's action, as a matter of fact and as shown by its allegations, involves a federal question, in [fol. 340] that it involves the construction and application of the order and judgment made and entered as alleged in plaintiff's said complaint or bill by the United States Dis-

trict Court for the Western District of the State of Arkansas, Texarkana Division, in that it seeks to enforce same in Texarkana, Texas, by compelling said defendant to observe and comply therewith in making charges for gas in the City of Texarkana in the State of Texas, and thereby give to said order and judgment of said Federal Court extra territorial force, all as shown by the plaintiff's said complaint or bill, and which with reference thereto is made a part hereof as though fully copied herein.

14

That the time within which your petitioner, Southern Cities Distributing Company, defendant herein, is required by the laws of this state, and the rules of this Court, to answer or plead to the declaration or petition of the plaintiff, in the above entitled action, has not expired.

15

Your petitioner, defendant herein, presents herewith a bond with good and sufficient surety, conditioned that it will enter into the District Court of the United States for the Eastern District of Texas, Texarkana Division, within thirty days from the time of the filing of this petition and of said bond a certified copy of the record in this suit, and [fol. 341] that it will pay all costs that may be awarded by said United States District Court in case said Court shall hold that suit was wrongfully or improperly removed thereto.

Wherefore, your petitioner prays that this Court proceed no further herein, except to accept said surety and bond and by order cause the record herein to be removed into said District Court of the United States within and for the Eastern District of Texas, Texarkana Division of said Court, according to the statute in such cases made and provided.

Southern Cities Distributing Company, petitioner,
by W. H. Arnold, Jr., H. C. Walker, Jr., King,
Mahaffey, Wheeler & Bryson, Its Attorneys.

Duly sworn to by Jno. J. King. Jurat omitted in printing.

[fol. 342] [File endorsement omitted.]

IN DISTRICT COURT OF BOWIE COUNTY, TEXAS

No. 19771

ORDER OVERRULING PETITION FOR REMOVAL—June 11, 1934

On this the 11th day of June, A. D. 1934, court being in regular session, came on to be heard the petition of Southern Cities Distributing Company, one of the defendants in this cause, for removal of this cause to the District Court of the United States for the Eastern District of Texas, Texarkana Division, and said defendant as petitioner ap- [fol. 343] peared by its attorneys, W. H. Arnold, Jr., and Jno. J. King, and the plaintiff, The City of Texarkana, Texas appeared by its attorneys, Ed B. Levee, Jr., City Attorney for said City of Texarkana, Texas, and B. E. Carter, and it was made to appear that the defendants, Lon A. Smith, C. V. Terrell and Ernest O. Thompson as members of the Railroad Commission of Texas, had filed their appearance, and also an answer in the cause, and said defendant, petitioner, having by leave of the court filed on this date its amended petition for removal, the Court proceeded to hear said amended petition for removal.

Said petitioner presented and urging said petition for removal at the same time presented and tendered its bond for such removal, and the Court having heard the argument, and being advised as to the law, concluded that the cause of action, in view of the said members of the Texas Railroad Commission being made parties defendant, was not removable, but that the bond of petitioner tendered was sufficient in form and as to the amount and as to the surety to meet all of the requirements of the law.

It is, therefore, ordered, adjudged and decreed by the Court that the said petition of said Southern Cities Distributing Company for removal be and it is in all things overruled and refused, but that if the case was removable, the said bond of said petitioner for removal is as to form, amount and as to surety, in all things sufficient to meet the requirements of the law. To which judgment and order [fol. 344] refusing and denying the petition for removal said petitioner thereupon and in open court excepted.

This date having been previously set for a hearing of the plaintiff's petition for a temporary injunction, said

hearing is continued until Friday, June 15th, 1934, at ten o'clock A. M.

R. H. Harvey, Judge, Fifth Judicial District.

[File endorsement omitted.]

TRANSCRIPT OF THE RECORD OF BOWIE DISTRICT COURT FILED IN THE U. S. DISTRICT COURT, ETC.

State: "Transcript of the record of Bowie County District Court was on June 13, 1934, filed in the United States District Court for the Eastern District of Texas, Texarkana Division."

[fol. 345] IN UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF TEXAS, TEXARKANA DIVISION

CITY OF TEXARKANA, TEXAS, Plaintiff,

vs.

SOUTHERN CITIES DISTRIBUTING COMPANY et al., Defendants

PETITION OF DEFENDANT FOR REMOVAL TO FEDERAL COURT—Filed June 13, 1934

To the Honorable Randolph Bryant, Judge of the District Court of the United States for the Eastern District of Texas:

Your petitioner respectfully shows:

1

Petitioner, Southern Cities Distributing Company is one of the defendants in the above entitled cause which was originally filed in the District Court of Bowie County, Texas, Fifth Judicial District, being case numbered 19,771 upon the docket of said court, which was filed on May 23, 1934, at Boston, Texas.

2

Petitioner filed a petition and bond for the removal of this cause to this federal court. Said petition was filed on June 2, 1934, within the time provided for by federal statute.

Prior to filing, notice was served upon plaintiff's attorneys of the filing of said petition and bond.

[fol. 346] 3

On June 11, after leave of the court was first had and obtained, petitioner filed an amended petition for removal.

4

Thereafter, on June 11, 1934, the Judge of said state court, after having heard argument of counsel, made and entered an order in said cause, denying said petition for removal.

5

Petitioner filed in this court on the — day of June, 1934, a certified transcript of the record and proceedings in said state court, all within the thirty days provided for by statute.

6

All of the pleadings and the order above referred to are set forth in said record, to which reference is made for greater certainty.

7

As shown by the order overruling the petition for removal the plaintiff, City of Texarkana, Texas, has caused a hearing on plaintiff's petition for a temporary injunction to be set for Friday, June 15, 1934, at ten o'clock A. M.

8

Petitioner shows to the court that if any further action is taken in said state court on said date, it will be wholly [fol. 347] without jurisdiction of the state court, but will inflict irreparable injury and damage upon the defendant, Southern Cities Distributing Company, and that its rights may be prejudiced thereby.

9

Petitioner makes a part of this petition its pleadings for removal filed in the said state court, which states the grounds upon which this cause is removable to the federal court.

Defendant, Southern Cities Distributing Company, states that the plaintiff in said case, the said City of Texarkana, Texas, purposes and intends to proceed in said action in said state court on said June 15, 1934, to take further steps and to ask for orders and judgment therein.

Wherefore, petitioner prays that prior to further procedure by plaintiff in said state court, and order be made and entered by this court restraining all proceedings in said state court until further order of this court, and restraining the City of Texarkana, Texas, its Attorneys, officials and agents from taking any further steps in the said suit in the state court until the question of removability of this cause can be settled; that this court issue an order holding that the cause be removed to this court, and that the case be docketed in this federal court.

Southern Cities Distributing Company, by H. C. Walker, Jr., W. H. Arnold, Jr., King, Mahaffey, Wheeler & Bryson, Its Attorneys.

[fol. 348] *Duly sworn to by Jno. J. King. Jurat omitted in printing.*

[File endorsement omitted.]

[fol. 349] In District Court of the United States

[Title omitted]

Response of Plaintiff to Petition for Restraining Order and Motion of Plaintiff to Remand—Filed June 13, 1934

To the Honorable Randolph Bryant, Judge of the District Court of the United States for the Eastern District of Texas:

Comes the plaintiff, the City of Texarkana, Texas, and appearing especially for the purposes of this response and motion only, saving and reserving any and all objections which it has to the jurisdiction of this Court, and for its response to the petition filed herein by the Southern Cities

Distributing Company asking that this Court restrain all proceedings in the District Court of the State of Texas in and for Bowie County, Texas, and for its motion that this cause be remanded to the said District Court of Bowie County, Texas, respectfully shows:

1. That under the provisions of the Johnson Bill, same being Public Act No. 222 of the 73rd Congress of the United States approved May 14th, 1934, this Court has no jurisdiction to grant the relief prayed for by the plaintiff in its [fol. 350] petition filed in the State Court. This case is not one over which this Court could have had jurisdiction and is not one which the plaintiff could have filed in this Court. This is a suit to enjoin an action of the Railroad Commission of Texas, which is an administrative board and Commission of the State of Texas, and is a suit to restrain, suspend and enjoin the enforcement and operation of the order entered by said Railroad Commission granting to the defendant the Southern Cities Distributing Company an appeal from an order made by the City Council of the City of Texarkana, Texas, which City Council is a rate making body of a political subdivision of the State of Texas. The jurisdiction of this Court, as shown by the plaintiff's petition for removal, is invoked solely on the alleged ground of diversity of citizenship and of an alleged separable controversy and under the provisions of the statute above quoted this Court has no jurisdiction.

2. No separable controversy exists between the plaintiff, the City of Texarkana, Texas, and the defendant, the Southern Cities Distributing Company, in this case. The Southern Cities Distributing Company, a public utility supplying gas to the City of Texarkana, Texas, applied to the City Council of said City, which City Council is a rate making body of a political subdivision of the State of Texas, for an increase in gas rates. The City Council of said City refused to grant said increase on the ground that the defendant Gas Company had bound itself by contract not to apply [fol. 351] for an increase in rates except after one year's notice and that it had not shown any ground why the City Council should waive the rights of the City under said contract and also upon the ground that said Gas Company had not shown that its present rates were not fair or were unreasonable. The defendant Gas Company thereupon filed

on March 5, 1934, with the Railroad Commission of Texas an appeal from this order, and that Commission on March 12, 1934, made an order allowing said appeal on condition that the Company file a bond, which bond has never been filed. The plaintiff's petition in this case in the District Court alleged that said appeal of the Gas Company was in violation of its contract and also alleged that the Texas Railroad Commission and the members thereof had no right or authority to entertain said appeal or to relieve the defendant Gas Company of its contract that it should not apply for an increase in rates except after one year's notice.

The defendant Gas Company had also contracted with the City of Texarkana, Texas, that in the event it was forced to place lower rates in effect in Texarkana, Arkansas, than those which were in effect in Texarkana, Texas, it would at once give to the City of Texarkana, Texas the benefit of such lower rates. The defendant Gas Company was forced, as alleged in the original petition herein, to place lower rates in effect in Texarkana, Arkansas and to make this reduction retroactive to May 30, 1930. The City Council of the City of Texarkana, Texas, being a rate making body [fol. 352] of a political subdivision of the State of Texas, in the course of the proceedings upon the application of the defendant Gas Company for an increase in rates, ordered said Gas Company to place in effect in Texarkana, Texas, the lower rates which it had been forced to place in effect in Texarkana, Arkansas, and which were then in effect in said City. The Gas Company, on March 5, 1934, filed with the Texas Railroad Commission an appeal from this order of the City Council and said Railroad Commission on March 12, 1934, granted this appeal and directed that said order of the City Council should be suspended and superseded on the filing and approval of a bond by the Gas Company.

The plaintiff seeks in its original petition herein to enjoin the Gas Company from prosecuting this appeal and to enjoin the members of the Texas Railroad Commission from entertaining this appeal and from granting the defendant Gas Company any relief from the order of the City Council.

The plaintiff says that the controversies above described are not separable controversies and that there are no sepa-

rable controversies presented in its original petition filed in the District Court of Bowie County, Texas. The defendants, the members of the Railroad Commission of Texas, prior to the action of the State Court on the petition for removal herein, filed in said Court their answer in which they alleged and set up that they did have jurisdiction to entertain said appeals and that it was their duty to do so and to determine [fol. 353] them and in which they protested against any order being made enjoining them from hearing and deciding said appeals.

For further response to the petition for a restraining order herein the plaintiff shows that no restraining order is necessary to uphold the jurisdiction of this Court, if it does have jurisdiction; that no great or irreparable injury will result to the Southern Cities Distributing Company if this Court refuses to grant a temporary restraining order. They say further that no court has yet passed upon or construed the statute (the Johnson Bill) above referred to, except the District Court of Bowie County, Texas, in passing upon the petition for removal in this case, and that Court decided that this case was not one of which this Court has jurisdiction; and the plaintiff says that the clear purpose of said statute is to deprive the Federal Courts of jurisdiction to interfere with, to restrain, or to enjoin any action of a state rate making body, that this controversy is now pending in the State Courts where a plain, speedy and efficient remedy may be had unless this Court interferes with the orderly procedure in said State Court, and that if this Court is not now ready to pass upon the question of its jurisdiction it ought not to interfere with the orderly procedure in the case which was brought in the State Court and as to which the State Court has decided that it has jurisdiction.

[fol. 354] The plaintiff further shows the Court that the rule in all of the Federal Courts except those in the Eighth Circuit is that where the jurisdiction of the Federal Court is doubtful the case shou-d be remanded to the State Court where the jurisdiction is beyond dispute and that the uniform practice, so far as this plaintiff has been able to ascertain, is to refuse to enjoin proceedings in State Courts where the jurisdiction of the Federal Court is doubtful and where the only injury to the defendant will be the inconven-

ience and expense of double litigation and where no very great expense will be involved.

Premises considered the plaintiff prays that the defendant take nothing by its petition for a restraining order herein and that upon a hearing of the plaintiff's motion to remand that this cause be remanded to the District Court for the Fifth Judicial District in and for the County of Bowie and State of Texas.

Respectfully submitted, Ed B. Levee, Jr., Ben E. Carter, Attorneys for the plaintiff.

[File endorsement omitted.]

[fol. 355] IN DISTRICT COURT OF THE UNITED STATES

In Equity. No. 109

[Title omitted]

ORDER OVERRULING MOTION TO REMAND, AND GRANTING INJUNCTION AGAINST CITY—Filed June 15, 1934

Now on this June 13, 1934, came Southern Cities Distributing Company by its Attorneys, W. H. Arnold, Jr., and Jno. J. King, and came the City of Texarkana, Texas by its Attorneys B. E. Carter and Ed B. Levee, Jr., whereupon the Southern Cities Distributing Company presented its petition to the Court asking this court to hold that it has jurisdiction over this cause, and to restrain the City from prosecuting or taking any steps in the District Court of Bowie County, Texas, in which court the case was originally filed. The City of Texarkana, Texas, presented motion to remand the case; and the court after having heard the arguments and statement of counsel for each side, and being well and sufficiently advised, both as to the law and the facts,

It is ordered, adjudged and decreed that this cause should be and the same is hereby removed to this court, and the motion of the City of Texarkana, Texas, to remand the case [fol. 356] to the District Court of Bowie County, Texas, is overruled. It being further represented to the Court that the City was about to take some steps before the District Court of Bowie County, Texas,

It is further ordered that the City of Texarkana, Texas, its Mayor, Aldermen, officials and Attorneys, be and they

are hereby restrained and enjoined from further prosecuting or taking any steps in the District Court of Bowie County Texas, in this suit.

The City of Texarkana, Texas, excepted and asked that its exceptions be noted of record, which is accordingly done.

Randolph Bryant, Judge.

O.K. as to form: B. E. Carter, Ed B. Levee, Jr.

[File endorsement omitted.]

[fol. 357] In District Court of the United States

In Equity. No. 109

[Title omitted]

Answer and Counter Claim of Defendant—Filed July 12, 1934

To the Honorable Randolph Bryant, United States District Judge:

Now comes the Southern Cities Distributing Company, and for its answer to plaintiff's original petition in this case which was removed to this court in June 1934 and counterclaim states:

I

That on November 3, 1933, it filed with the city council notice and application for change and modification of rates, copy of which is attached as Exhibit "C" to plaintiff's original bill herein and defendant now reaffirms the statements therein contained. As said application states, the gas rates have failed and, in the future, will fail to produce revenues sufficient to pay operating expenses, much less an amount for depreciation, and return on investment; The application sets forth a new schedule for domestic and commercial rates: $1.75 for the first 1000 cubic feet of gas, 75¢ each for the next 2000 cubic feet of gas, 55¢ each for the next [fol. 358] 7000 cubic feet of gas, and 35¢ each for all over 10,000 cubic feet of gas. The losses under the franchise rates were set forth and it was shown that the new rates would not produce more than what the company was entitled to, and that the current losses were $350.00 per day.

II

On November 9, 1933, defendant filed motion for prompt hearing and action, copy of which is hereto attached as Exhibit "A" and the statements therein are here re-affirmed. Said motion avers that it was essential, to avoid daily confiscation of the company's property, that the council have prompt hearing and temporarily authorize the new rates to be placed into effect pending final hearing of the council, on the ground that the company would have no remedy for recovering each day's loss in the interval before it should obtain final relief.

III

On November 14, 1933, the company was present in the Council meeting by its attorneys with witnesses, and requested permission to introduce its evidence, but the council refused to hear the company; without a hearing, the Council passed "A Resolution Calling On Southern Cities Distributing Company For Information Needed by The Council In Connection With Said Company's Application For New Rates And Ordering Said Company Not To Put Into Effect [fol. 359] The Proposed Rates Shown In The Notice And Application Filed With The City Secretary On November 3, 1933," Referring to the company's application and motion for prompt hearing, which asked that the council pass upon that part of the application praying for prompt preliminary relief, and referring also to Section VIII-A of the franchise of June 13, 1930, the resolution stated: "The Council is willing, if proper information is submitted to it, but without waiving any of its rights under said franchise ordinance above described and without waiving any of its rights or any of the rights of the consumers under the laws, general and special, of the State of Texas, to consider the question whether it would waive said provisions of said franchise;" and called upon the company for detailed evidence as to the company and its affiliated pipe line companies and as to all matters relating to the fixing of rates; and "does order and require that before the council will proceed with the hearing on the application heretofore filed with it, said information shall be furnished in writing, in duplicate and under oath, the Council finding that it is necessary that it have knowledge of the facts hereinafter set forth in order to enable it to pass upon said application and to perform its duties to the gas consumers in said city, said information

so required being as follows:" * * * here follow detailed and voluminous questionnaire and interrogatories going into great detail. This resolution in Section II refers to important factors in fixing the rates and in determining the question whether the company is losing money in its [fol. 360] plant in Texarkana, Texas, and recites that "The Council cannot pass upon the question whether" etc. without the information hereinbefore called for. Section III orders the company "not to put the proposed new rates into effect pending a hearing and decision upon its application," and postpones a hearing until the information should be furnished. Section IV provides that the council will pass on objections to any of the questions on November 28, 1933. Section V provides that "as soon as the Southern Cities Distributing Company informs the Council when it can and will furnish the information herein called for, the council will take up the question of setting its application for final hearing."

IV

On November 16, 1933, the city filed petition in the District Court of Bowie County, Texas, to enjoin the company from increasing its rates in Texarkana, Texas. Temporary Restraining order was granted by the Judge of the Bowie District Court on the same day suit was filed without notice to or knowledge of the Company and without a hearing accorded to it. This suit was removed to this court and answer and counter-claim was filed by the company. The City thereafter filed amended and substituted petition and the company filed amended and substituted answer and counter-claim. Thereafter the city in open court moved to dismiss both its petition and the company's counter-claim. The city's petition was non-suited, but the court overruled [fol. 361] the city's motion to dismiss the company's cross bill. The pleading and record of this court in said suit are made part hereof by reference.

V

On November 17, 1933, defendants filed with the Council request that the questions be amended in certain respects. On November 28, 1933, the company appeared by its attorneys with witnesses, and the council passed a resolution amending the interrogatories and propounding additional interrogatories.

VI

On the — day of December 1933, the company appeared by its attorneys with witnesses and filed in duplicate and under oath the voluminous evidence requested. On the same day, the council passed another resolution with reference to the date of hearing.

VII

On the 12th day of December 1933, in the absence of the Company or its attorneys or witnesses or representatives, the council without notice to the company and without a hearing, passed a resolution which referred to a decree of the U. S. District Court for the Western District of Arkansas, dated December 1, 1933, holding,—not upon the merits, but upon a technicality—that the rates in Texarkana Arkansas, should for the present be those adopted in Texarkana, Arkansas, in 1923, and ordering refund since June [fol. 362] 1930 to December 1, 1933. The said resolution also referred to Section IX of the franchise of June 13, 1930, in Texarkana, Texas, and in Section I resolved: "The Southern Cities Distributing Company is now ordered and directed to comply with its franchise contract and agreement and to restore in the city of Texarkana, Texas, the rates for gas which were in effect in said city on and prior to the passage and acceptance of the franchise ordinance above described, to put such rates into effect on all bills rendered by it to gas consumers on and after December 1, 1933, and to maintain such rates in effect until such time as they may be lawfully changed." Section II reads: "The City Attorney is directed to call upon said company at once to make refunds to all its consumers in Texarkana, Texas, of the difference between the amounts collected from them under said franchise since May 30, 1930, and the rates which have been found in said case to have been the lawful rates in the city of Texarkana, Arkansas, during said period and upon the basis of which refunds have been ordered to consumers in said city," and in the event of refusal of the company to make such refunds, the city attorney was ordered to file suit in the name of the city for the benefit of the gas consumers for recovery of such refunds. Copy of the resolution is attached to plaintiff's original bill and it is made part hereof by reference.

VIII

On December 27, 1933, the Council passed a resolution with reference to the time of the hearing.

[fol. 363]

IX

On January 2, 1934, the Council passed a resolution with reference to the time of the hearing.

X

On January 22, and 23, 1934, there was a full hearing before the Council at which both sides were represented by attorneys and at which voluminous evidence was introduced, consisting of documentary and of record evidence and testimony of experts, engineers, accountants and other witnesses, covering all phases of the rate case; at the conclusion of which the council passed a resolution dated January 23, 1934, stating that its resolution of November 14, 1933, "recited that it was willing, if proper information be submitted to it, but without waiving any of its rights under said franchise contract, to consider the question whether the provisions of said contract were oppressive or unjust and whether it should waive the same and calling upon said Southern Cities Distributing Company to furnish the proper information from which the Council could determine said question." The resolution further recites that the Council "having heard all the evidence, does hereby make the following findings with reference to the question as to whether it should waive the provisions of said franchise agreement and consent to consider an application for increased rates without said one year's notice and with reference to the propriety of the increased rates and charges pro-
[fol. 364] posed by the company." The findings of the Council then follow in 25 pages of the resolution. The conclusion of the resolution sets forth an order that: (1) the Council refuses to waive and still insists upon the franchise provision of one year's notice and orders the city attorney "to pursue and insist upon his application now pending in the courts for an injunction to secure a specific performance of said franchise agreement;" (2) that the schedule of rates proposed by the company "are unjust and unreasonable and are exorbitant and improper rates and would result in an even greater and more unjust discrimination against the

consumers of gas of Texarkana, Texas, than are the rates the company is now collecting in violation and in disregard of its franchise agreement to give the consumers in this city the benefit of any rates it is compelled to place in Texarkana, Arkansas, and said Southern Cities Distributing Company is forbidden to put such proposed new rates into effect;" (3) "The city attorney is ordered, and directed to continue and to insist upon his application now pending in the courts for an order directing said company to comply with its franchise agreement and to place in effect in Texarkana, Texas, the rates it has been compelled to place in effect in Texarkana, Arkansas;" and (4) notifies the company that one year after date it will enter into a hearing to determine whether the rate should not be reduced to 40¢ per m. c. f.

[fol. 365] XI

In Texarkana, Arkansas, application of the company for change and modification of rates was filed October 23, 1933, and full hearing was completed on December 22, 1933, resulting in resolution of the Council of Texarkana, Arkansas, which denied the company's application and prescribed a schedule of rates reaffirming the 1923 rates with certain modifications. On November 14, 1933, the city council of Texarkana, Arkansas, notified the company that the council, at the hearing of the Company's application on December 22, 1933, and would also "consider whether or not the rates collected by the company for natural gas should not be reduced below the present lawful rates." The said resolution of December 22, 1933, recited that the Council did not have evidence from which it could accurately determine certain facts and that it was necessary to obtain further evidence and continued the matter of the said city's notice to January 23, 1934, at which date it was further continued to February 13, 1934, when the council without evidence other than that theretofore introduced prior to the said resolution of December 22, 1933, further lowered the charges to a net 40¢ rate. Southern Cities Distributing Company had prepared bill in equity to enjoin the schedule of rates in Texarkana, Arkansas, prescribed in the said Resolution of December 22, 1933; and on February 9, 1934, gave notice to the city of Texarkana, Arkansas, of application for temporary injunction to be heard before Honorable Heartsill Ragon in the U. S. District Court for the Western District [fol. 366] of Arkansas at Ft. Smith, Arkansas, on February

16, 1934. In the meantime, the order of the Council in Texarkana, Arkansas, dated February 13, 1934, was passed which prescribed still lower rates; whereupon plaintiff rewrote its bill in equity to enjoin the rates prescribed on February 13, 1934, for Texarkana, Arkansas. After hearing in Ft. Smith on February 16, 1934, the court enjoined the City of Texarkana, Arkansas from enforcing the rates prescribed February 13, 1934, or those prescribed December 22, 1934, or any less rates than the schedule filed by the company and from interfering with the company in charging the rates of the schedule it had filed with the Council on October 23, 1933. Since February 12, 1934, the rates charged in Texarkana, Arkansas, have been according to the schedule filed by the company. The case is now pending on reference to Master in Chancery.

XII

On March 3, 1934, this defendant appealed to the Railroad Commission of Texas by filing petition with said Commission wherein it prayed that said commission fix and approve the schedule filed by the company, and that it set aside the Council's resolution of December 12, 1933. On the 21st day of April, 1934, the city filed in the Railroad Commission its motion to dismiss the appeal of Southern Cities Distributing Company, or, in the alternative, that all further proceedings in the commission be abated until such time as the liti- [fol. 367] gation in the U. S. District Court for the Eastern District of Texas should be finally disposed of. The Company undertook to proceed in the Railroad Commission and requested that the City's motion to dismiss the appeal be set for hearing and action, but so far its efforts have been unavailing, the Commission requiring as a condition precedent to the appeal, a certain $10,000.00 bond, and the Commission will not recognize the appeal or take action unless such a bond is filed whereas in this case, the Commission is without right or power to require said bond.

XIII

On May 23, 1934, the case at bar was filed in the District Court of Bowie County, Texas, by petition of the city, which is substantially the same as the amended and substituted petition of the city in the first case which it filed in November 1933, except that in reference to the alleged cause

of action to restrain the company "from taking any steps before the Railroad Commission of Texas," it is also alleged that the Railroad Commission should be restrained from taking jurisdiction to the appeal.

XIV

This defendant denies that the City Council of Texarkana, Texas, on March 13, 1923 granted a franchise to Southwestern Gas & Electric Company, although the council did pass an ordinance on said date, the terms of which will appear by [fol. 368] certified copy thereof, but said ordinance has been superseded by a new franchise that was granted to this defendant on June 13, 1930. The rates therein set forth were proposed by the council to the company after investigation and hearings, and they were accepted by the company. Defendant denies that it is estopped from questioning those terms or conditions of the said franchise that are invalid and not binding; denies that it is estopped from changing or attempting to change and modify the rates therein set forth, because the rate making power cannot be abridged, contracted away or held in abeyance, and because rates are always subject to regulation and cannot be fixed so they cannot be modified and changed by the city or by the company if the evidence justifies, and because the facts in this case show that the franchise rates are confiscatory; defendant denies that its notice and application for change and modification of rates filed on November 3, 1933, and efforts to secure reasonable rates in the Council and in the Railroad Commission were or are in violation of any valid provisions of the franchise agreement or of Section VIII-A thereof.

XV

This defendant denies that said Section VIII-A of the franchise constitutes a valid and binding waiver of its rights under the Texas statutes to secure an increase in rates, except upon one year's notice; denies that its attempt to secure an increase by appeal to the Railroad Commission is in violation of any of the valid terms of the fran- [fol. 369] chise; denies that the Railroad Commission is without jurisdiction and is without power to pass upon the schedule of rates filed by the company; denies that plaintiff is entitled to an injunction restraining Southern Cities Distributing Company from proceeding with the appeal.

XVI

Defendant states that plaintiff has no cause of action to prevent the company increasing the prescribed and confiscatory rates and no cause of action to enjoin the appeal to the Railroad Commission; that Southern Cities Distributing Company cannot proceed with its appeal to the Railroad Commission because *of* Railroad Commission takes the position that the appeal is not perfected and will not be perfected unless Southern Cities Distributing Company files the bond called for; and in the absence of such a bond which it is under no obligation to give, Southern Cities Distributing Company cannot prosecute its appeal.

XVII

This defendant denies that any franchise was granted by the Council on March 13, 1923, to Southwestern Gas & Electric Company, although an ordinance of the Council was passed on or about said date which will speak for itself, and avers that said ordinance and Article E thereof were superseded by the franchise of June 13, 1930. Defendant denies that said Article E or Section IX of the franchise [fol. 370] of 1930 are valid or binding agreements on either the city or this defendant; denies that the city of Texarkana, Texas, and the City of Texarkana, Arkansas, are one city in law; denies that the same plant in all parts serves both cities; denies that consumers in Texarkana, Arkansas, are served from the same mains as consumers in Texarkana, Texas, except in certain cases.

XVIII

This defendant denies that in Texarkana, Arkansas, referendum petitions against the Resolution of May 30, 1930, of the City Council of said City were once circulated in Texarkana, Arkansas, and given a great deal of publicity in the newspapers; denies that such alleged petitions and publicity took place prior to the action of the Council of Texarkana, Texas, on June 13, 1930; denies that it was then contemplated by both or either party that the resolution in Arkansas might be upset by means of said petitions; denies that Section IX was designed to take care of the situation in the event the resolution in Arkansas should be upset; denies that it was in violation of Section IX of the franchise

that this defendant failed and refused to put into effect in Texas the rates which the company placed in effect in Texarkana, Arkansas, on December 1, 1933. Defendant states that if Section IX were assumed to be valid, it is not ambiguous and would relate only to the amount to be charged in Texarkana, Texas, after December 1, 1933, and prior to February 12, 1934, and could not be construed to be retro-[fol. 371] active. Even if said provisions could be assumed to be valid and ambiguous, there is no indication that it was contemplated that the resolution of May 30, 1930, in Arkansas might be upset; it was not prior to June 13, 1930, contemplated by anyone that there would be any litigation or contest over the validity of the Resolution of May 30, 1930, in Arkansas. It was assumed and agreed by both parties that the rates fixed in the franchise of June 13, 1930 would be valid and binding until such time in the future as the rates in Arkansas might be reduced by a new application and rate case upon notice and hearing to be started by the City of Texarkana, Arkansas, at some future date, and that was the only contingency that could have been or was contemplated by any of the parties at the time the franchise of June 13, 1930, was passed.

XIX

This defendant denies that the gas consumers in Texarkana, Texas, are entitled to an order directing defendant to at once place in effect in the City of Texarkana, Texas, lower rates provided in the alleged franchise of 1923; denies that such consumers are further entitled to an order directing defendant to make refunds to such consumers for the excess collected by the company from the time the franchise rates of June 1930 were put into effect, down to February 16, 1934, over and above the amount which is alleged to have been due under rates provided under the alleged franchise of 1923.

[fol. 372] Defendant denies that the decree of the United States District Court in Arkansas compelled it to place in effect in Texarkana, Arkansas, as of May 30, 1930, rates less than the rates shown in the Texas franchise dated June 13, 1930, but states that the same rates were charged in both sides of the City until December 1, 1933; denies that said franchise contains any valid provisions that if the defendant is compelled to place lower rates in effect

in Texarkana, Arkansas, that the lesser rate shall apply in the City of Texarkana, Texas; denies that the provision referred to, even if assumed to be valid, bears the construction the City placed thereon; denies that defendant has received from numerous gas consumers in the City of Texarkana, Texas, assignments to the plaintiff of a part of such alleged refunds as may be due them; denies that such alleged assignments were granted to the City for the purpose of paying the expenses of this litigation and for the purpose of paying the expenses of the present controversy now pending as to increased rates; denies that it would be unfair and unjust to the plaintiff to permit the defendant to defeat the City's alleged right to recover under said alleged assignments by any offsets which defendant might claim against such alleged refunds arising on and after the date of the filing of said petition; denies that the plaintiff and the gas consumers in Texarkana, Texas, are without any adequate remedy at law; denies that the plaintiff will be damaged in the sum of $50,000.00 or in any other sum; denies that plaintiff is entitled to any injunction re- [fol. 373] straining this defendant from put-ing into effect an increase in rates in the City of Texarkana, Texas, except after having given one year's notice, or restraining the defendant from putting into effect increased rates at any time or in any manner except at the time and in the manner which plaintiff alleges is provided in the franchise agreement; denies that plaintiff is entitled to any order restraining defendant from prosecuting and from taking any further steps in its appeal which has been lodged with the Railroad Commission of Texas; denies that plaintiff is entitled to an injunction against the Railroad Commission of Texas; denies this defendant should be ordered to comply with Section IX of the franchise as alleged by plaintiff, or to, at once or at any other time, place in effect in the City of Texarkana, Texas, the rates for gas which were placed in effect in the City of Texarkana Arkansas, on December 1, 1933; denies that the court should require bond from this defendant conditioned that in the event it is not successful in maintaining rates which it is now collecting under a temporary restraining order in Texarkana, Arkansas, and is compelled to make refunds down to the basis of a lower rate, the company should also make refunds to its consumers in the City of Texarkana, Texas, down to the basis of such lower

rates; denies that this defendant should be ordered to file with the Clerk of the Court statement as alleged in the third section of the prayer or to pay any amount into the registry of the court.

[fol. 374] XX

This defendant states that Section VIII-A of said franchise is invalid in that it conflicts with and violates the laws and constitution of the State of Texas under which the power of rate regulation cannot be suspended or held in abeyance and under which rates cannot be contracted by any binding provisions; after notice and hearing, they are subject at all times to change if the facts justify. Under the regulatory powers of the state, said Section VIII-A is invalid because it attempts to make binding provisions as to rates suspending, and holding in abeyance the governmental power of the state and its subdivisions, which is subject to exertion at any time; the governmental power of regulation of rates cannot be suspended for any definite and certain period of time; but rates however fixed and prescribed whether in a franchise or contract or in an order of a regulatory body, are subject to a change at any time thereafter, either upon the initiation of the city or upon the application of the company. Said Section VIII-A is not binding upon the city and, being unilateral, cannot be binding on the defendant for want of mutuality; the city lacks the power to make any binding agreement which shall hold in abeyance its governmental power over rates. If it should be conceded that rates could be controlled by binding contract, there would in view of the laws and constitution of the State, be such an inevitable conflict between that binding provision and the dominant power to regulate as to render the contract inoperative and, therefore, to cause it to [fol. 375] perish from the mere fact of admitting its conflict with the power to regulate. The duty of the owner of property used for public service to charge only a reasonable rate and thus respect the authority of the government to regulate in the public interest, and of the government to regulate by fixing such a reasonable rate as will safeguard the rights of private ownership, are interdependent and reciprocal. The legislative power of regulating rates is a continuing one and may not be abridged or bartered away by contract or otherwise, or held in abeyance, or suspended.

Defendant states that it had the right on November 23, 1933, to place into effect the schedule of rates it had filed with the council, but that it has not done so as yet. Its right is grounded in the fact that the franchise rates were and are and will continue daily confiscatory of its property resulting in daily loss as herein shown. Defendant states that its efforts before the regulatory bodies in Texas have not produced speedy, adequate or secure relief, and, in fact, the said bodies are without jurisdiction under Texas laws to grant temporary relief; the city alleges that the statutes of Texas "provide that pending the hearing before the city council said increased rates should not be placed into effect, and in the event of an appeal, they should not be placed in effect until the appeal should be passed upon by the Railroad Commission." Defendant here re-iterates the allegations contained in its application of November 3, 1933 and in its motion and affidavits filed November 9, 1933, and [fol. 376] makes them part hereof by reference, copy of former being attached to plaintiff's bill, and copy of the latter being attached hereto. Defendant has done all it could to get relief without avail, and will have no remedy for what it has lost and continues to lose, before it shall have finally obtained relief.

The Railroad Commission of Texas has jurisdiction on the appeal from the order of the council dated January 23, 1934, refusing to grant the company's application of November 3, 1933, but erroneously refuses to recognize the appeal unless the company complies with its condition for a certain bond which it may not legally require. Article 6058 of the Revised Statutes of Texas of 1925 is construed by the decisions of Texas to provide that, where the utility seeks to increase existing rates, the increase cannot be put into effect until the commission makes its final order on appeal from refusal of the council to allow the increase. Said statute in such cases requires that the existing rates continue in statu quo and not be increased until final disposition of the case before the commission. The said statute is invalid as so construed by the courts of Texas and is violative of the due process and equal protection clauses of the Fourteenth Amendment to U. S. Constitution, in that it requires enforcement of rates that are daily confiscatory until such time as the commission makes final disposition, which may take from a few months to many months and in

this case the commission will not take jurisdiction without a bond as aforesaid, which the company refuses to file. In-[fol. 377] deed, if the Railroad Commission should take jurisdiction, it has been by statute denies power to permit increased rates with or without bond pending final hearing. It was without notice or hearing that the Railroad Commission of Texas denied the application of the company for a temporary order superseding the existing rates pending final hearing; and even if notice had been given and if a hearing had been held, the commission is without jurisdiction under Texas laws as aforesaid to allow such temporary relief regardless of the evidence. In the absence of such power, defendant has the right to fix its own rates to prevent daily confiscation of its property.

Defendant states that it has now the right to increase its rates according to the schedule it filed, and that the court should cancel Section VIII-A of the franchise and hold the Resolution of January 23, 1934, invalid, and sustain its rights in the premises. Defendant states that the City is attempting to give force and vitality to said Section VIII-A of its franchise ordinance and that such attempts on the part of the City are in violation of the law of Texas, and that the said section should be cancelled and annulled. Defendant states that its attempts and efforts to secure relief are not in violation of any valid provisions of its franchise, and are not in violation of the laws of the State of Texas, but are in conformity therewith, and yet defendant has been unable to secure relief. Defendant denies that it had the power to waive its right to seek reasonable remuneration [fol. 378] for furnishing gas in Texarkana, Texas, and denies that it did waive such right; but states that, if Section VIII-A could be assumed to be valid, the city has waived it as herein shown.

XXI

This defendant states that even if Section VIII-A of the franchise agreement could be assumed to be valid, the council has waived Section VIII-A by its order denying the Company's application on its merits and by its actions leading up thereto, in calling upon the company to go through a complete rate case, and in having a full hearing etc., consuming great expense, time and effort of the company, and in holding itself out as willing to consider the matter upon its merits and in considering the matter on its merits. Such

an order of the council on its merits is reviewable by the said commission.

XXII

Defendant states that Article E of the ordinance of March 13, 1923 is invalid for the reason that it is not now in force, as it has been superseded and for the same reasons as those set out in relation to Section IX of the franchise dated June 13, 1930. Defendant states that Section IX of the franchise dated June 13, 1930, is invalid; because it undertakes to change the laws of Texas and to deprive the city Council of Texarkana, Texas, of its lawful and sole jurisdiction; because it undertakes to delegate to and vest in [fol. 379] extra-territorial authorities and bodies outside of the State of Texas, the non-delegable power to regulate or fix rates within the State of Texas; because it is ultra vires the council; and because it undertakes to change and modify rates upon a contingency, or future event, in violation of the constitution, statutes, laws and rules of Texas, which provide that rates may be changed only after notice and hearing and only if the facts justify which they do in this case. Said Section IX undertakes to provide that if the company should be compelled to place into effect any rates in Texarkana, Arkansas, less than the franchise rates lawfully adopted in Texarkana, Texas, then, from the date of placing into effect such rates in said city in Arkansas, that the company shall thereupon apply the lessened rate in Texarkana Texas, and shall not be authorized to charge any higher rate—regardless of Texas laws, and regardless of the fact that said rates would be greatly confiscatory of the company's property and cause it daily loss—and regardless of the fact that the decree of the court in Arkansas was not based on, nor did the court undertake to consider the merits of the rate. Even if it could be assumed that Section IX is valid, it does not mean what the city contends it to mean; and it is not retro-active, and could not lawfully be retro-active. Defendant states that said Section IX cannot be upheld to prevent alleged discrimination against the gas consumers in the City of Texarkana, Texas, because the alleged discrimination cannot apply to divest the City Council of Texarkana, Texas, of its jurisdiction and place it [fol. 380] elsewhere, and cannot be made an issue herein. Defendant states that Section IX of said franchise is in conflict with the powers conferred upon regulatory bodies by

the statutes of the State of Texas, and denies that the alleged discrimination is or can become an issue herein and denies that there is any discrimination as alleged.

XXIII

The action of the Council on December 12, 1933, is a nullity and has no force because it was passed without notice to the company and without evidence or a hearing. The only action of the council concerning a reduction of rates after notice and hearing is that which gives notice that one year after January 23, 1934, it would enter into a hearing concerning whether or not the rates should be reduced. The Council has made no order reducing the rate.

XXIV

The rates set forth in the franchise of June 13, 1930, are confiscatory and have caused and will continue to cause daily confiscation of defendant's property; that the effect of the actions of the City Council of the City of Texarkana, Texas, in undertaking to deny to defendant the right to earn any fair return upon the present fair value of its property used and useful in rendering public utility gas service to the City of Texarkana, Texas, is to deprive defendant of its property without due process of law, deny [fol. 381] it the equal protection of the law, and usurp its business management, all in contravention and in violation of the Constitution and laws of the State of Texas and of the Fourteenth Amendment to and of the Constitution of the United States of America.

XXV

That: (a) On the basis of the 1923 rates for the first part and of the rates of the franchise of June 13, 1930, for the second half of the year ending December 31st, 1930, defendant's gross revenue in Texarkana, Texas, was $307,286.76, its expenses $399,347.90, or a difference of $92,061.14 between its expenses and gross revenue.

(b) On the basis of the franchise rates for the year ending December 31st, 1931, defendant's gross revenue was $306,640.48, its expenses $365,812.90, or a difference of $59,172.42 between its expenses and gross revenue.

(c) On the basis of the franchise for the year ending December 31st, 1932, defendant's gross revenue was $261,-432.54, its expenses $327,087.46, or a difference of $65,-654.92 between its expenses and gross revenue.

(d) Except for the first half of 1930, when the 1923 rates were collected, the rates charged were the franchise rates. If the 1923 rates were applied, a greater loss would have resulted in each of said years.

[fol. 382] (e) If the rates proposed in defendant's application of November 3, 1933, be applied, defendant's revenue in 1932 would have been approximately $313,037.29, its total expenses for said year being $327,087.46, leaving a difference between gross revenue and expenses of approximately $14,050.17.

XXVI

That: (a) the present fair value of defendant's gas distribution system in Texarkana, Texas, used and useful in rendering gas service to its customers in the City of Texarkana, Texas, as of June 30, 1934, is not less than $525,-195.64.

(b) Defendant is entitled to interest at the rate of eight per cent per annum on the fair value of its said distribution system, amounting to not less than $42,015.65; that a less rate of return would shake confidence in plaintiff's securities and would not enable plaintiff to obtain money for the operation and financing of its business.

(c) Defendant is entitled to an annual depreciation charge of not less than five per cent upon $411,645.64, the fair value as of June 30, 1934, of the depreciable property in its distribution system in Texarkana, Texas, amounting to $20,582.28.

(d) Defendant must take into consideration in its statements of earnings such sum as may be necessary to allow for federal income taxes, calculated at not less than $6,698.15.

[fol. 383] (e) Defendant is entitled to charge rates for the service which it renders to gas consumers in the City of Texarkana, Texas, which will produce sufficient revenue to enable it to earn its expenses, an amount for federal in-

come taxes, proper depreciation and a reasonable return upon the fair value of its property used and useful in rendering such service. On the basis of the rates in the schedule filed by defendant, defendant would fail by $83,346.25 in 1932 to earn its expenses, an amount for income taxes, depreciation and a reasonable return; the figures for the year 1933 are not more, but are less favorable to an earning sufficient to take care of its expenses, an amount for income taxes, depreciation and a reasonable return, and defendant states that its experience in the immediate future will not be sufficiently favorable to permit it to earn such expenses, taxes, depreciation and reasonable return.

XXVII

That the relationship between defendant and the Arkansas Louisiana Pipeline Company and Reserve Natural Gas Company of Louisiana, which operates the pipeline system supplying natural gas to defendant for distribution in its distribution system at Texarkana, Texas, is that, except for a few shares, the stock of each of said three corporations is owned by the Arkansas Natural Gas Corporation.

[fol. 384] XXVIII

That defendant does not produce natural gas and has no supply for sale and distribution to its customers at Texarkana, Texas, other than that it purchases from the Arkansas Louisiana Pipeline Company and Reserve Natural Gas Company of Louisiana, for which it pays for gas furnished for domestic purposes an agreed price of $0.39 per thousand cubic feet, and other agreed rates for gas used for other purposes; the said Arkansas Louisiana Pipeline Company and Reserve Natural Gas Company of Louisiana refuse to sell to defendant for less, and without which said supply defendant is unable to carry on its business of distributing gas in Texarkana, Texas, which rates defendant believes and avers are reasonable.

XXVIV

That the aforesaid pipeline system of the Arkansas Louisiana Pipeline Company and Reserve Natural Gas Company of Louisiana is interstate, extending into the states of Arkansas, Texas and Louisiana; that the said

pipeline system produces in part and purchases at the wells of other producers in part, the gas it transports to cities having distribution systems and otherwise; defendant is informed, believes and avers that said pipeline system is economically and efficiently managed; that the rates which are charged defendant by said system are the lowest reasonable rates which can be charged for gas furnished at [fol. 385] Texarkana, Texas; that said rates produce less than expenses, depreciation and a reasonable return on the fair value of the property of the said pipeline system or the value of the service rendered.

XXX

Defendant is informed, believes and avers that as of June 1, 1934, the date of the latest valuation, the present fair value of the production and transportation property of the Arkansas Louisiana Pipeline Company and Reserve Natural Gas Company of Louisiana was not less than $35,041,826.21.

XXXI

Defendant is informed, believes and avers that the revenues and expenses of said pipeline system for 1930, 1931 and 1932, the figures for 1933 not being at this time available, are:

	1930	1931	1932
Revenues	$7,497,780.07	$6,534,397.65	$5,947,160.44
Expenses	4,128,211.14	3,904,185.52	3,314,671.84
Losses in Gasoline Plants	7,609.27	931.61	7,531.09
Earnings Available for depreciation and return on Investment and income Taxes	3,361,959.66	2,629,280.52	2,624,957.51

Deducting $249,130.80 for 1930; $161,209.30 for 1931; and $184,124.57 for 1932, as for income taxes and an annual [fol. 386] depreciation charge of five per centum of depreciable transportation property of $1,285,869.70, leaves net earnings available for return on the property of said pipe-

line system of $1,826,959.16 for 1930; $1,182,201.52 for 1931; and $1,154,963.24 for 1932; or on $35,041,826.21, the fair value of the system as of June 1, 1930, a percentage return of 5.21% for 1930; 3.37% for 1931; and 3.30% for 1932.

XXXII

That the City Council of Texarkana, Texas, in undertaking to find whether the rates and charges filed and applied for by defendant were just and reasonable, found:

(a) That the Arkansas Natural Gas Corporation is substantially owned and is actually controlled by the Cities Service Company and that the Cities Service Company is managed and controlled by Henry L. Doherty, doing business as Henry L. Doherty & Company; whereas, there was no evidence before said council whatsoever of the ownership of the Arkansas Natural Gas Corporation or of the control and management of the Cities Service Company of Henry L. Doherty & Company; and such finding with respect to the Arkansas Natural Gas Corporation is incorrect and without foundation in fact; on the contrary, the owners of the preferred stock of the Arkansas Natural Gas Corporation select the majority of the board of directors of that corporation and thereby control the same, and the Cities Service Company does not own a majority of the [fol. 387] preferred stock of said Arkansas Natural Gas Corporation.

(b) That the sums paid to Henry L. Doherty & Company under contract with the Arkansas Louisiana Pipeline Company and the Reserve Natural Gas Company of Louisiana referred to as "pipeline companies" are not properly chargeable into the expenses of such pipeline companies in arriving at the cost and reasonableness of the charges for gas furnished defendant by such pipeline companies, because the cost of the service rendered by Henry L. Doherty & Company to such pipeline companies was not shown; whereas, under said contracts and the relations of the parties thereto, such charges are reasonable, just and proper for the service rendered. Henry L. Doherty & Company has built up and maintains a complete organization for the designing, construction, operation and development of public utilities and natural gas properties. This organization consists of experienced executives, financial

advisers, construction, valuation and gas engineers, geologists, technicians, rate experts and accountants. The expense to a corporation like the said pipeline companies of maintaining such an organization to provide the services furnished by Henry L. Doherty & Company would be prohibitive. Such contracts placed at the disposal of the pipeline companies, engineering, accounting, geological, business and financial services of a value and of a character and extent which could not be economically acquired by individual corporations or any small group of them. Like [fol. 388] contracts are made by other public utilities with similar organization-, such as Ford, Bacon & Davis, Stone & Webster and others. The propriety of such contracts is to be determined by the sound business judgment of the owners of the companies. The activities of Henry L. Doherty & Company of direct benefit to distributing and pipeline companies are those tending to increase consumption of natural gas by advertising, developing and marketing of gas burning appliances; geological, technical and research, tax, valuation and rate, purchasing, training of personnel, preparation and care of corporate records, engineering, accounting, auditing, finance and construction.

(c) That the sum of $66,042.50 paid in 1930 for rentals on nonproducing gas leases should not be charged into the operating expenses of the pipe line companies, because such leases are not at present used for production of gas; a considerable part are located in Mississippi, more than a hundred miles from the nearest pipeline of the pipeline companies; the pipeline companies have reserves of gas under their present producing leases adequate to supply their present requirements for approximately five years; these nonproducing leases were acquired and are being held for the use of customers whom the pipeline companies hope to serve at least five years in the future; whereas, such nonproducing leases are, as to a large percentage thereof, in proven acreage and constitute a fair and reasonable reserve without which a pipeline system would be of little value. Such leases are located within a reasonable range of the pipeline system and none of such reserves are located [fol. 389] so as not to be of full value to the pipeline companies, those located in Mississippi being in the vicinity of pipelines with whom such pipeline companies may at any

time exchange gas to the advantage of both; and supplies and reserves limited to a period of approximately five years would be wholly inadequate to guarantee continued and uninterrupted service. Maintenance of such gas reserves is not only good business judgment, but an absolute necessity to guarantee adequate and uninterrupted service and a matter in which the City Council should not be permitted to substitute its business judgment for that of the business management of the said pipeline companies.

(d) That the sum of $63,666.28 amortization of the cost of nonproducing leases should not be charged into the operating expense of the pipeline companies, because such leases have not been drilled and proven to be nonproductive, and the charge is an amortization of the cost of acquiring such leases and not incurred in connection with the property now used and useful to the present consumers of gas; whereas, the cost of acquiring such leases amortized over the primary term thereof is a fair and proper charge and necessary to maintain adequate reserves to insure continued and uninterrupted service, dictated by good business judgment and without which the value of the properties of said pipelines would be greatly diminished. Such properties are both used by and useful to the present consumers of gas. [fol. 390] None of such reserves have been acquired without first subjecting them to critical geological investigation and analysis.

(e) That the charges for bad debts and adjustments should be reduced to the amounts actually charged off; whereas, the accrual of such charges is proper and should be included in the expenses for the reason that such accruals are results arrived at by experienced accountants and credit men taking into consideration the experience of the companies over a term of years, and it is a safe and proper method of arriving at proper charges for bad debts and adjustments of such a system as the pipeline companies operate.

(f) That the annual charge of five per cent depreciation on the transportation and general property, excluding producing property should be reduced to two per cent; whereas, a depreciation allowance of five per cent on the value of the depreciable property is fair, just and reasonable and

the allowance of two per cent depreciation, and the finding of the value of $24,132,581.53, as the depreciable property is unfair, unjust, unreasonable and arbitrary. The actual experience of the pipeline companies demonstrates that the business of producing and transporting gas is a hazardous one, resulting in the continual replacement of pipelines and building, of new lines, exhaustion of gas fields and reserves, and the five per cent depreciation is not more than reasonable, fair and just, and that a less depreciation allowance is arbitrary unjust and unreasonable.

[fol. 391] The sum of $24,132,581.53 found by the City Council as the value of the depreciable property of the pipeline companies is arbitrary and unreasonable; it wholly disregards contractor's fee.

The amount of depreciation which should be allowed is not affected by the net balance shown in replacement reserves on the books of the pipeline companies. The actual book charges against reserves in particular years have no relation to the amounts which should be allowed annually against expenses and credited to depreciation reserve account, because such actual book charges are not averaged over a life cycle of the entire properties because such experience is not available to the pipeline companies, a large portion of the system of said companies having been built since 1928.

(g) That the present fair value of the property of the pipeline companies, upon which they are entitled to earn a return is $27,334,274.28; whereas, as hereinabove shown, the fair value as of June 1, 1934 on the basis of cost of reproduction new less depreciation, is not less than $35,041,826.21.

The City Council also excluded, in arriving at its said figures, the sum of $4,267,120.80, going concern value which represents cost of attaching and developing the business and is measured by the fixed charges for interest, depreciation and taxes on those portions of the property which are idle or unused during the development period for the time that such portions are idle and unused, and which is a value [fol. 392] that an established business has over a business projected but not established.

The City Council also reduced the sum of $1,404,382.06 working capital, to $500,000.00, based on its finding that the

expenses of the pipeline companies for a sixty day period would be such sum. The actual experience of said pipeline companies and their estimated needs for the future in maintaining and operating their properties show that the figure found by the City Council is inadequate and insufficient to meet the needs of said pipeline companies.

The City Council also excluded in arriving at its valuation, the sum of $1,123,505.65, cost of financing, which overlooks the actual experience of these and other companies in projecting an enterprise such as this pipeline system and takes into no account the actual experience of marketing securities in order to procure capital with which to construct and build such enterprises.

(h) That the rate of return of eight per cent on the valuation of the transportation and general properties of the pipeline companies should be reduced to six per cent because of depressed business conditions and because the pipeline system of these companies was built to carry a greater volume of gas than it is now carrying and because its business is no longer hazardous; whereas, the percentage of eight per cent is just and reasonable. The experience of these pipeline companies and others in the business [fol. 393] of producing and transporting natural gas shows that it is a hazardous enterprise and its sources of supply are constantly being depleted and changed and its pipeline system moved, replaced and rearranged; that a less rate of return would result in impairing its ability to procure capital, make its securities unattractive and result in impairing its ability to render the gas service required by plaintiff, to its detriment and that of its customers.

The said City Council, in arriving at its said figures, took into account the experience of said pipeline companies for the year 1930, but based its valuations on prices of 1932, which were very much lower than the prices prevailing in 1930. If the figures of 1930 should be used, the prices likewise of 1930 for valuation purposes should be used.

The rates of return as found by the City Council, as hereinabove shown, were based on erroneous deductions and allowances, and for that reason are incorrect and arbitrary and without foundation in fact.

(i) That the amounts paid Henry L. Doherty & Company by defendant for services rendered during the years

1930, 1931 and 1932, amounting to $5,377.52, $5,366.21 and $4,577.07, should be stricken from the expenses of defendant at Texarkana, Texas for the reason that the cost of rendering such services, to Henry L. Doherty & Company was not shown; whereas, for the reasons set forth with respect to the services rendered to the Arkansas Louisiana Pipeline Company and the Reserve Natural Gas Company [fol. 394] of Louisiana, under similar contracts with said Henry L. Doherty & Company, such charges are fair, reasonable, just and proper for the services rendered and a matter of agreement, as to which the sound business judgment of the management of defendant should not be disregarded.

(j) That the proper method of calculating the cost to defendant of gas purchased from the pipeline companies is not the agreed price nor the cost of the service based on use, but should be fixed on the basis of the proportion of total expenses and return on property which the total gas sold to consumers in Texarkana, Texas, bears to the total gas sold by the pipeline companies to all consumers; whereas, the proper method of calculating such cost to defendant, if not upon the agreed price which defendant is compelled to pay, is not less than the actual cost of the service based on use; and the allocation based on the proportion of gas sold to consumers in Texarkana, Texas, to the total volume of gas sold by said pipeline companies is arbitrary, unsound and illegal.

(k) That there should be deducted from the value of the property or rate base, upon which a return should be allowed, the sum of $60,000.00 for going concern value; whereas, such sum represents loss by depreciation and interest on idle plant, cost of training men, taxes, and in brief, what is known as cost of attaching business, or a value which an established business has over a prospective one.

[fol. 395] (l) That there should be deducted from the value of the property or rate base, upon which a return should be allowed, the sum of $20,000.00 for cost of financing; whereas, such sum is less than the actual cost of securing capital employed in the property and business of defendant in serving its customers in Texarkana, Texas, and is a proper charge in arriving at the value of the property used

and useful in the gas service of defendant in the City of Texarkana, Texas.

(m) That the depreciation rate of five per cent on depreciable property of defendant in Texarkana, Texas, should be reduced to two per cent; whereas, the depreciation allowance of five per cent on the valuation of the depreciable property of defendant is fair, just and reasonable; and a less rate, unreasonable and wholly arbitrary. The actual experience of defendant, its predecessors and others demonstrates that the business of distributing gas in Texarkana, Texas, due to shifting of lines, development of service and other factors, requires a calculation of rate of depreciation of not less than five per cent and that a less depreciation allowance is unreasonable and arbitrary.

(n) That no allowance should be made for federal income tax, either in the expenses of the pipeline companies or of defendant, because such tax has not actually been paid; whereas, the assessment for such tax depends upon net earnings and the effect of the right to file consolidated returns with affiliated corporations avoiding the payment of [fol. 396] income taxes by offsetting gains of some with losses of others, does not destroy the initial liability for such tax. It is an expense of the earning corporation and must be, as such, taken into account.

(o) That the rate of return of defendant upon the fair valuation of its property used and useful for serving its customers in Texarkana, Texas, is six per cent; whereas, a rate of return less than eight per cent will result in impairing the ability of plaintiff to procure capital and to render the gas service required to its customers in Texarkana, Texas.

(p) That the City of Texarkana, Texas, is entitled to free gas for use at its municipal buildings, jails and fire stations; whereas, the furnishing of free gas to said city for such purposes would further decrease the revenues of defendant and result in further loss and confiscation, and that said city is wholly without right to require such service free of cost or without paying the proper rates and charges therefor.

(q) That the amounts of unaccounted for gas are in excess of the amount of gas that would be unaccounted for in a

properly maintained plant, and that the company should not be allowed to charge against its consumers in Texarkana, Texas, the cost of gas which it allows to escape from its distributing system in excess of the proper and normal amount; whereas, the work necessary to bring the distribution system [fol. 397] of plaintiff at Texarkana, Texas, to the standard so found by the said City Council consists in repairs and not in new construction and the revenues of said distribution system have not been sufficient since defendant's acquisition thereof in 1928, under the rates existing and charged since such date to return to defendant its bare expenses and a sum necessary for such purposes and defendant has been and will be unable to make such repairs as may be necessary to effect such result unless permitted to charge the proposed or higher rates; that is the standard leakage found by the said City Council can be properly attained only by proper increase in the rates presently fixed by the resolutions and orders complained of. The cost of such repairs is a proper expense chargeable against revenues and not a capital expense and should and must be charged to and borne by those receiving the service.

XXXIII

Defendant avers that it is suffering a loss in excess of $350.00 per day by reason of failure to receive sufficient revenue from its operations in the City of Texarkana, Texas; that its revenues received from the operation of its properties in Texarkana, Texas, are insufficient to pay its operating expenses and that such losses amount to daily confiscation of plaintiff's property; that losses and damages sustained before the hearing cannot be re-couped.

[fol. 398] XXXIV

That the Fourteenth Amendment of the Constitution of the United States of America provides that no state shall deprive any person of property without due process of law, and guarantees to every person the equal protection of the laws. That defendant is entitled to the benefit and protection of said constitutional provision, and it now invokes and urges same as against the actions of said City of Texarkana, Texas, in the distribution and sale of gas in said city sufficient to prevent the confiscation of its said property and to earn a reasonable return above its necessary expenses upon

the fair value of its property used and useful in rendering such services.

XXXV

Defendant states that the effect of the attempts of the city to prevent it from charging the rates filed and applied for, is to impose upon the defendant a daily loss amounting to daily confiscation of its property; that any lower rates will fail to yield revenue sufficient to pay expenses of operation, depreciation, taxes and a reasonable return upon the fair value of its said property. That the attempt of the city to force it to charge less rates than those applied for, if successful, will deprive it of its property to its damage in a sum or value exceeding three thousand dollars ($3,000.00), exclusive of interest and costs, without due process of law, and deny defendant the equal protection of the laws; that [fol. 399] under the Fourteenth Amendment to the Constitution of the United States, no state may deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws; and defendant does now plead and invoke said provision of the United States Constitution for the protection of its property, and the Constitution and laws of the State of Texas; the attempts of the city to keep defendant from putting into effect less rates than that applied for, are violative of these provisions of the United States Constitution, and defendant urges said constitutional provisions as a protection against said efforts of said plaintiff.

XXXVI

Wherefore, upon consideration of its answer and counterclaim defendant prays that the petition of plaintiff be denied and that Sections VIII-A and IX of the franchise ordinance be declared null and void, and be cancelled, and that said contract be construed to merely mean that the rates specified should continue until changed, either by an appropriate action on the part of the city or upon application of the defendant, and that it be further held that the rates filed by it are lawful rates; that the claims may by the plaintiff be cancelled as cloud upon the title of this defendant to its distribution plant in the City of Texarkana, Texas; that its right to increase its rates as per schedule filed by it be sus-[fol. 400] tained; that defendant recover all costs herein in-

curred; and defendant prays for such other and further relief, general and special, to which it may be entitled.

H. C. Walker, Jr., W. H. Arnold, Jr., King, Mahaffey, Wheeler & Bryson, Attorneys for Southern Cities Dist. Co.

EXHIBIT "A" TO ANSWER

Texarkana, Texas,
November 7, 1933.

To the Honorable Mayor and City Council of the City of Texarkana, Texas:

In re Notice and Application of Southern Cities Distributing Company Filed November 3rd, 1933

MOTION FOR PROMPT HEARING AND ACTION

I

Applicant, Southern Cities Distributing Company, asks for immediate preliminary hearing and action by the Council upon that part of its application, filed November 3rd, 1933, which asks for immediate authority to place into effect the new schedule of rates contained in its application, pending final hearing. Applicant states that it is essential, to avoid daily confiscation of Applicant's property, that the Council have a prompt meeting and hearing and temporarily authorize the new rates to be placed into immediate effect pending final hearing upon reasonable bond or upon Applicant's putting up the difference in the rates in a deposi- [fol. 401] tory to be named. Applicant is prepared to present its evidence at once.

Applicant further requests the Council to hear it upon this part of the application and not to delay the same; and states that, in the absence of supersedeas, stay, and temporary relief, its application for prompt action would fail to produce relief to which it is entitled and that postponement would amount to denial of its application for temporary relief as much as express denial. Applicant now requests and insists that it be accorded a preliminary hearing to show the damage which is being done each day to applicant's property and to show the necessity of immediate

action by the Council. If Applicant does not place in effect the new rates immediately, it will have no remedy for recovering each day's loss until such time as obtains final relief.

II

Applicant hereto attaches affidavit showing the necessity of immediate preliminary consideration and action by the Council authorizing the Applicant, upon security, to place the new rates into immediate force and effect, pending final hearing, and hereby requests that the Council have a meeting on November 10, 11, 13 or 14, 1933, to pass upon this part of the application and grant stay of the existing rates.

III

Wherefore, Applicant prays: That the Council hold prompt preliminary hearing and grant that part of its [fol. 402] application requesting action providing for temporary relief, under bond, supersedeas, or other method: and that the amount of the bond be fixed, or a depository be named in which to impound the difference between the present rates and the rates applied for.

(Signed) H. C. Walker, Jr., W. H. Arnold, Jr., King, Mahaffey, Wheeler & Bryson, Attorneys for Applicant, Southern Cities Distributing Company.

[File endorsement omitted.]

Duly sworn to by Jno. J. King. Jurat omitted in printing.

[fol. 403] Plaintiff's Motion to Strike Out Answer and Counterclaim- -September 24, 1934

Plaintiff's motion to strike out said answer and counterclaim. Do not copy, refer to Item 11 above.

Motion to Record Change of Name of Defendant—January 18, 1935

Motion to Record Change of Name of said defendant to Arkansas Louisiana Gas Company. Do not copy, refer to Item 12 above.

ORDER SUBSTITUTING NAME OF DEFENDANT TO ARKANSAS LOUISIANA GAS COMPANY—January 18, 1935

Order substituting the name of Arkansas Louisiana Gas Company in lieu of Southern Cities Distributing Company and changing the style of cause to: "City of Texarkana, Texas v. Arkansas Louisiana Gas Company, and Lon A. Smith, C. V. Terrell and Ernest O. Thompson, Members of the Railroad Commission of Texas." Do not copy, refer to Item 13 above.

ORDER OF CONSOLIDATION—September 18, 1935

Order of Consolidation. Do not copy, refer to Item 14, above.

[fol. 404] SUPPLEMENTAL BILL OF CITY OF TEXARKANA, TEXAS —December 30, 1936

Supplemental Bill of City of Texarkana, Texas. Do not copy, refer to Item 15 above.

SEPARATE AMENDED ANSWER OF DEFENDANT—July 14, 1937

Separate Amended Answer of defendant, Arkansas Louisiana Gas Company, to Plaintiff's Original and Supplemental Petition, and Counterclaim of Arkansas Louisiana Gas Company. Do not copy, refer to Item 16 above.

MOTION THAT DEFENDANT'S PLEADING FILED JULY 14, 1934, BE RECOGNIZED AND ORDERED APPLICABLE TO BOTH CASES—July 19, 1937

Motion that defendant's pleading filed July 14, 1934 be recognized and ordered applicable to both cases. Do not copy, refer to Item 17 above.

ORDER RECOGNIZING DEFENDANT'S PLEADING FILED JULY 14, 1934, ETC.—July 19, 1937

Order recognizing defendant's pleading filed July 14, 1937 and ordering that it be taken to apply as defendant's addi-

tional pleadings in both cases 106 and 109 In Equity. Do not copy, refer to Item 18 above.

[fol. 405] MOTION OF PLAINTIFF TO STRIKE "SEPARATE AMENDED ANSWER OF DEFENDANT," ETC.—July 19, 1937

Motion of plaintiff to strike "Separate Amended Answer of Defendant, Arkansas Louisiana Gas Company to Plaintiff's Original and Supplemental Petition; and Counterclaim of Arkansas Louisiana Gas Company." Do not copy, refer to Item 19 above.

FINAL DECREE—July 30, 1937

Final Decree. Do not copy, refer to Item 20 above.

IN UNITED STATES DISTRICT COURT

No. 106 and No. 109, in Equity, Consolidated

[Title omitted]

MOTION OF ARKANSAS LOUISIANA GAS COMPANY FOR SEVERANCE AND GRANT OF SEPARATE APPEAL—Filed September 22, 1937

Now come Arkansas Louisiana Gas Company, one of the defendants in the above entitled causes, and show to the [fol. 406] Court that Arkansas Louisiana Gas Company has heretofore given all the other parties affected by the final decree herein reasonable notice that this defendant would on 23 day of September, 1937 at 11 o'clock A. M., or as soon thereafter as these interveners can be heard, apply to His Honor, Judge Randolph Bryant, for an order allowing them an appeal in said causes from the final decree entered therein rendered, to the United States Circuit Court of Appeals for the Fifth Circuit, and requesting them to join in such appeal; that all of said parties so affected by said decree have failed and refused and do now fail and refuse to join these interveners in such appeal, and this defendant now here offers proof of the facts hereinbefore stated.

Wherefore, this defendant moves the Court for an order allowing it to an appeal separately in these causes.

John J. King, H. C. Walker, Jr., W. C. Fitzhugh, W. H. Arnold, Jr., Solicitors for Arkansas Louisiana Gas Company.

Copy received and notice accepted 9-16-37. B. E. Carter, E. B. Levee, Jr., Attorneys for City of Texarkana, Texas.

[File endorsement omitted.]

[fol. 407] IN UNITED STATES DISTRICT COURT

No. 106 and No. 109, in Equity, Consolidated

[Title omitted]

ORDER OF SEVERANCE—Filed September 23, 1937

Now on this 23 day of September, 1937 comes defendant Arkansas Louisiana Gas Company and presents its motion for severance. The court finds that due notice has been given to all the other parties affected by the final decree from which this appeal is prayed. The court sustains the motion of Arkansas Louisiana Gas Company and orders that said defendant have leave to appeal without joining the other defendants in said appeal and orders that severance be and the same is hereby granted, and Arkansas Louisiana Gas Company shall have the right to appeal in these causes without joining any of the other parties thereto in such application for appeal.

Randolph Bryant, United States District Judge.

O.K. as to form: E. B. Levee, B. E. Carter, Attorneys for City of Texarkana, Texas.

[fol. 408] [File endorsement omitted.]

PETITION FOR APPEAL, ASSIGNMENTS OF ERRORS, BOND, ORDER GRANTING APPEAL, CITATION IN APPEAL, SERVICE AND PRAECIPE—September 23, 1937

Petition for Appeal, Assignment of Errors, Bond, Order Granting Appeal, Citation in Appeal, Service, this Praecipe. Do not copy, refer to Item 21 above.

IN UNITED STATES DISTRICT COURT

In Equity. No. 106

[Title omitted]

PLAINTIFF'S PETITION FOR DISMISSAL WITHOUT PREJUDICE—Filed May 21, 1934

Comes the plaintiff, the City of Texarkana, Texas, and moves the court to dismiss this suit without prejudice at plaintiff's costs.

Ed. B. Levee, City Attorney; B. E. Carter, Attorneys for Plaintiff.

[File endorsement omitted.]

[fol. 409] IN UNITED STATES DISTRICT COURT

In Equity. No. 106

[Title omitted]

ORDER OF DISMISSAL—May 22, 1934

Dismissed on application of plaintiff without prejudice at plaintiff's cost.

IN UNITED STATES DISTRICT COURT

In Equity. No. 106

[Title omitted]

ORDER OF CONSOLIDATION AND ORDER OF DISMISSAL—Filed September 21, 1935

On May 21st. 1934, there was filed in this cause a motion by the plaintiff that this suit be dismissed without prejudice, at plaintiff's costs, and thereupon the defendant appeared [fol. 410] and objected to the dismissal of said suit insofar as its cross action was concerned, and, at that time, the

Court announced that he would take the matter under further consideration. Thereafter, on the 13th day of June, 1934, at Sherman, Texas, the plaintiff being present by Ed. B. Levee, Jr., and B. E. Carter, its attorneys, and the defendant being present by W. H. Arnold, Jr., and Judge John J. King, its attorneys, the Court announced that he would not dismiss this suit insofar as the cross action contained in the defendant's answer was concerned, and that, if the plaintiff desired, it might reinstate its cause of action, and that the Court was willing to consolidate said cause No. 106 in Equity with cause No. 109 in Equity then pending in the Texarkana Division of this Court, wherein the City of Texarkana, Texas, was plaintiff, and the Southern Cities Distributing Company, which is now the Arkansas-Louisiana Gas Company, was defendant. Thereupon the plaintiff asked the Court to note its exceptions to the order refusing to dismiss the whole of said cause No. 106, which is done. The plaintiff now informs the Court that, in view of the refusal of the Court to dismiss the whole of said cause No. 106, it desires to have its original cause of action reinstated and to have said cause No. 106 consolidated with said cause No. 109, and the plaintiff further requests the Court that the motion to strike the answer and cross complaint of the defendant, which has been filed in cause No. 109, should be considered and treated as going to and being filed with reference to the answer and cross complaint of the defendant in cause No. 106.

It is therefore, by the Court considered, ordered, adjudged and decreed that the petition of the plaintiff in this [fol. 411] cause, No. 106, to dismiss this suit without prejudice be overruled and denied insofar as the cross complaint or cross-action of the defendant is concerned and that any memoranda or orders heretofore entered on the docket or records of this Court to the contrary be corrected. The plaintiff, at the time, excepts to this order and asks that its exceptions be noted of record, which is done.

It is further considered, ordered, adjudged and decreed by the Court that the plaintiff in this cause No. 106 in Equity be, and it hereby is, permitted to reinstate its cause of action in this suit in view of the fact that the defendant's cross action is not dismissed, and the plaintiff having asked that this be done, its cause of action in this suit is hereby reinstated.

It is further considered, ordered, adjudged and decreed by the Court that this suit, No. 106 in Equity, wherein the City of Texarkana, Texas, is plaintiff, and the Arkansas-Louisiana Gas Company, formerly the Southern Cities Distributing Company is defendant, be and it hereby is consolidated with cause No. 109 in Equity, now pending in this Court, wherein the plaintiff is the same party as the plaintiff in this suit, and the defendant is the same party as the defendant in this suit, and that said two actions proceed under the number of 109 in Equity and under the style of City of Texarkana, Texas, plaintiff vs. Arkansas-Louisiana Gas Company, defendant.

It is further considered ordered, adjudged and decreed by the Court that the plaintiff's request that its m-tion to strike out the answer and counterclaim of the defendant in No. 109 in Equity be considered as going to and applying to the answer and counterclaim of the defendant in this suit, be granted and that said motion to strike the answer and [fol. 412] counterclaim in No. 109 in Equity is treated and considered as going to and applying to the answer and counterclaim of the defendant in No. 106 in Equity, as well as in 109 in Equity.

This the 18th day of September, 1935.

Randolph Bryant, Judge.

[File endorsement omitted.]

In United States District Court

Nos. 106 and 109, in Equity, Consolidated

[Title omitted]

Petition of City of Texarkana, Texas, for Appeal—Filed September 23, 1937

To the Honorable Randolph Bryant, Judge of said Court:

Comes the City of Texarkana, Texas, and feeling itself aggrieved by the decrees and orders of this Court, hereby prays that an appeal may be allowed to it from said decrees and orders to the United States Circuit Court of Appeals for the Fifth Circuit and, in connection with this peti- [fol. 413] tion, it presents herewith its assignment of errors.

Said city also prays that the Court make such order as may be necessary fixing the security for costs to be given by said city in the event it shall fail to sustain the appeal.

Ed B. Levee, Jr., B. E. Carter, Attorneys for City of Texarkana, Texas.

Copy received 9-22-37. W. H. Arnold, Jr.

[File endorsement omitted.]

In United States District Court

Nos. 106 and 109, in Equity, Consolidated

[Title omitted]

Assignment of Errors—Filed September 23, 1937

Comes the City of Texarkana, Texas, and in connection with its petition for appeal alleges that the orders and [fol. 414] decrees of this Court herein are erroneous and unjust to said city in the following particulars, which it assigns as errors, to-wit:

1. The Court erred in its order and decree entered herein on September 21, 1935, in setting aside the dismissal of suit No. 106 in its entirety, and in refusing to permit the dismissal of said suit No. 106 in its entirety.

2. The Court erred in cause No. 109 in overruling the plaintiff's response to the petition for removal and overruling the plaintiff's motion to remand this cause to the District Court of Bowie County, Texas, and in enjoining the plaintiff from further proceeding in said District Court in said cause No. 109.

3. The Court erred in its final decree in finding that no refunds were due to the plaintiff or to the gas consumers in the City of Texarkana, Texas, for the periods of time prior to December 1, 1933, and in rejecting plaintiff's demands for refunds for such period.

4. The Court erred in its final decree in finding that no reduction in rate should be ordered in the City of Texarkana, Texas, at the present time, and in rejecting plain-

tiff's demand for such rate reduction on the ground that it was premature.

5. The Court erred in finding that the City of Texarkana, Texas, and the consumers of gas therein are not entitled to any refund for rates collected from and after February 16, [fol. 415] 1934, and in dismissing plaintiff's bill insofar as it seeks such refunds for such period and insofar as it seeks a present reduction in rates.

6. The Court erred in refusing to order refunds to the consumers in Texarkana, Texas, for the period from June 13, 1930, to December 1, 1933.

7. The Court erred in refusing to order refunds to the consumers in Texarkana, Texas, for the period from February 16, 1934, to the present time.

8. The Court erred in refusing to order the gas company to place in effect in Texarkana, Texas, rates which are now in effect in Texarkana, Arkansas.

Wherefore, the City of Texarkana, Texas, prays that the decree of the United States District Court for the Eastern District of Texas be modified in the above respects and that it have judgment in all things as prayed by it in this Court.

Ed B. Levee, Jr., B. E. Carter, Attorneys for City of Texarkana, Texas.

Copy received 9-22-37. W. H. Arnold, Jr.

[File endorsement omitted.]

[fol. 416] Bond on Appeal for $1,000.00, approved and filed October 4, 1937, omitted in printing.

[fol. 417] IN UNITED STATES DISTRICT COURT

Nos. 106 and 109, in Equity, Consolidated

[Title omitted]

ORDER GRANTING APPEAL—Filed September 23, 1937

On this the 23rd day of September, 1937, comes the City of Texarkana, Texas, and presents its petition for an appeal

herein and presents with its petition its assignment of errors. The Court finds that such appeal should be granted and that bond should be fixed in the sum of one thousand ($1,000.00) dollars.

It is therefore, by the Court, considered, ordered, adjudged and decreed that the City of Texarkana, Texas, be and it hereby is granted an appeal to the United States Circuit Court of Appeals for the Fifth Circuit and that said [fols. 418-419] city furnish bond to the Arkansas Louisiana Gas Company in the sum of one thousand ($1,000.00) dollars to answer all costs if it fail to sustain said appeal.

Randolph Bryant, Judge.

Copy received 9-22-37. W. H. Arnold, Jr.

[File endorsement omitted.]

Citation, in usual form, showing service on Jno. J. King, filed September 30, 1937, omitted in printing.

[fol. 420] In United States District Court

Nos. 106 and 109, In Equity, Consolidated

[Title omitted]

Praecipe of City of Texarkana, Texas, for Transcript—Filed September 27, 1937

The City of Texarkana, Texas, acknowledges the receipt of a copy of the praecipe for transcript prepared by the Arkansas Louisiana Gas Company and requests that the following changes and additions be made to the transcript as order in said praecipe:

1. Following item No. 10 of the gas company's praecipe, please insert as item No. 10a a copy of the city's petition for dismissal without prejudice in cause No. 106, filed on May 21, 1934.

2. Immediately following said petition for dismissal in said cause and before item No. 11 in the gas company's

praecipe, please insert a copy of the order made and entered on May 22, 1934, in cause No. 106 dismissing said cause without prejudice. Said order may be found at page 165 of Vol. 2 of the Equity Minutes of this Court.

3. Please copy in full item No. 14 shown on the gas company's praecipe, same being the order of consolidation in cases No. 106 and No. 109. The gas company, in its praecipe, asks that this order should not be copied but should be abbreviated. The city requests that this order be copied in full.

[fol. 421] 4. The gas company requests in its praecipe, item No. 33, that the plaintiff's motion to strike out the answer and counter-claim of the gas company should not be copied. The city requests that it be copied.

(Request withdrawn. B. E. C. E. B. L., Jr.)

5. Please include in the transcript the petition of the city for appeal, assignment of errors of the city, bond of city, order granting appeal to city, citation in the appeal of the city and service thereof, and this praecipe.

The City requests that the above changes and additions be made to the transcript as ordered by the gas company.

This September 22, 1937.

Ed B. Levee, Jr., B. E. Carter, Attorneys for City of Texarkana, Texas.

Receipt acknowledged of a copy of the above praecipe this the 22 day of September, 1937.

W. H. Arnold, Jr., Attorney for Arkansas Louisiana Gas Company.

[File endorsement omitted.]

[fol. 422] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 423] That thereafter the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Fifth Circuit, viz:

ARGUMENT AND SUBMISSION

Extract from the Minutes of April 19th, 1938

No. 8646

ARKANSAS LOUISIANA GAS COMPANY
versus
CITY OF TEXARKANA, TEXAS

(And Reverse Title)

On this day this cause was called, and, after argument by Benjamin E. Carter, Esq., for appellee and cross-appellant, and W. C. Fitzhugh, Esq., and William H. Arnold, Jr., Esq., for appellant and cross-appellee, was submitted to the Court.

[fol. 424] OPINION OF THE COURT—Filed June 3, 1938

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 8646

ARKANSAS LOUISIANA GAS COMPANY
versus
CITY OF TEXARKANA, TEXAS

(And Reverse Title)

Appeal and Cross-Appeal from the District Court of the United States for the Eastern District of Texas

(June 3, 1938)

Before Foster, Sibley and Hutcheson, Circuit Judges

HUTCHESON, Circuit Judge:

What is in question here is the validity and enforcibility of, and the relief to be granted under, Section IX [1] of the

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Note 1. It was provided by Sec. IX:

"If grantee shall be finally compelled to, or should voluntarily place in any rates in the City of Texarkana Arkansas, less than the rates granted by the ordinance, then and

June 18, 1930 ordinance under which appellant holds and operates its franchise in Texarkana, Texas.

Texarkana, Texas, and Texarkana, Arkansas, are twin cities under separate state governments. Each has its [fol. 425] separate and complete political and corporate structure. In 1923 one gas company, the Southwestern Gas and Electric Company, served both cities, under a separate and distinct franchise as to each. Separate ordinances as to each city fixed substantially the same rates in each for domestic and commercial consumption. Article (e) of the Texas city franchise provided that the Utility "would not, nor would its successors and assigns, charge a greater sum for furnishing gas to domestic and commercial consumers in the city of Texarkana, than it at the same time charges and collects from like consumers, for similar services in Texarkana, Arkansas." In 1928 the franchises of the Utility in the two cities were assigned to the Southern Cities Distributing Company, now Arkansas Louisiana Gas Company, the appellant. In 1930 appellant applied to the Texas city Council for, and litigation was begun as to, increased rates over those fixed in 1923. After the Council had denied the application, and an appeal had been taken to the Railroad Commission, the City and the Gas Company reached and embodied in a new franchise an agreement for rates considerably higher than the 1923 rates they replaced. These rates, while differing in some particulars, were the same in substance as those which at about the same time appellant and the Arkansas city had agreed upon and fixed. The Texas city agreement provided that it should become effective upon written acceptance by the grantee. On June 18, 1930 this acceptance was filed.

No sooner had the 1930 agreements been effected than trouble began. In the Arkansas city the electors petitioned for a referendum on the 1930 ordinance. Litigation in state and Federal courts followed. When it was all over the 1930 ordinance was repealed, and on December 1, 1933, there was a court order making the 1923 rates effective in the Arkansas city, and requiring refunds to Arkansas city consumers back to 1930 on the basis of those rates. In the

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thereupon the lessened rate shall apply in the City of Texarkana, Texas, and Grantee shall not be authorized or permitted to charge and collect any higher rate."

[fol. 426] meantime, appellant, on October 23, 1933, applied to the Arkansas city Council for an increase in rates. That Council, on November 14, 1933, served notice that it would consider reducing the rates from 45¢ to 40¢. On December 22, 1933, appellant's schedules were rejected by the Council, the 40¢ rate was thereafter ordered in, and defendant filed its suit in the Federal court in Arkansas to prevent the enforcement of the 1923 or 45¢ rate, and the proposed reduction to 40¢ as confiscatory, and to enjoin the December 22 ordinance refusing to grant the October 23 application for increases. The refunds ordered were, however, made and from December 1, 1933 to February 16, 1934, when the Arkansas Council prescribed a 40¢ rate, and appellant obtained its restraining order, the Arkansas city consumers were billed on the 1923, or 45¢ rate. Thereafter, and until December 1936, the October 1933 rates appellant had proposed were put in force and maintained under injunction and bond. The District Court, on final hearing, permanently enjoined the 40¢ rate of February, 1934, dissolved the injunction as to the 1933 rates, and gave judgment on the intervention and bond for reparation, based on said rates. Appellant, without the benefit of injunction, or other suspensory order, except as to the judgment for refund in February, 1934, appealed from this decree, and the 1923 rate was again in effect, pending final disposition of the appeal, which is as yet undisposed of.

While these things were transpiring on the Arkansas side of the line, there was no quiet on the Texas or western, front. Rumblings of discontent over there, with the rates charged them, as against those being contended for in Arkansas, grew ever louder, until finally, in December 1933, the storm broke in the form of a resolution directing appellant to comply with Article IX of the franchise agreement, to place in effect in the Texas city the 1923 rates which, as the result of the decree of December 1, 1933, it was then collecting in Arkansas, and to make refunds to its Texas consumers as it [fol. 427] was doing in Arkansas, back to 1930 on the basis of the 1923 rates.

Appellant, on its part, was not idle. Moving pari passu on both fronts, on November 3, 1933 it applied to the Texas city Council to put in force there as of November 23, the same schedule of increases as those it had already, in October, 1933, applied for in Arkansas. On November 4 it filed

notice that it would, at the end of one year, apply for an increase over those then proposed. On November 14, 1933, the Texas city Council passed a resolution declaring that it was willing, without waiving its rights under the franchise, to consider whether the existing rates were unreasonable, and calling upon the company to furnish certain information. This information supplied, the Council in January, after a hearing on the application, adopted a resolution refusing to waive any of its franchise rights, or to grant an increase. In the meantime, on November 16, the Texas city sued appellant in the state court, and obtained a temporary injunction preventing it from putting into effect the increase of rates it had applied for, without having given the one year's notice required by Sec. VIII(a) of the franchise.[2] This suit was removed to the Federal court where appellant answered and counterclaimed that Sec. VIII(a) was invalid, that it was pursuing the proper course to secure the rate relief it was seeking, and prayed that the temporary injunction be dissolved, that Sec. VIII(a) be cancelled, and for general relief.

On January 15, 1934, the City amended to allege that if Sec. VIII(a) was invalid, the defendant still was not entitled to increase its rates, because it was not proceeding as required by the Texas statutes. In addition, invoking Sec. IX of the 1930 franchise ordinance, it sued to specifically enforce it, and for a decree requiring defendant to place in ef- [fol. 428] fect in the City of Texarkana, Texas, the lower rates then being charged in the Arkansas city, towit, 45¢, the 1923 rate, and to make reparation to the Texas city consumers back to 1930, based on that rate. On March 9, defendant replied to the City's amended petition by answer and counterclaim, reaffirming its position that Sec. VIII(a) was invalid, and that it was proceeding properly to get relief from the confiscatory rates, and alleging that Sec. IX was invalid, and that if valid and enforced, it did not entitle plaintiff to the relief claimed. It alleged that for a considerable part of the time it was supplying gas in the Arkansas city not at the 1923 rates, but at rates higher than those charged in the Texas city, and finally, that the rates fixed in

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Note 2. This section provided that the city would not apply for a reduction, the company for an increase, except upon a year's notice.

the 1930 Texas city ordinance were confiscatory. It prayed for a dismissal of the temporary injunction, the cancelling of Secs. VIII(a) and IX, and for general relief. On May 22, 1934, the City secured an order of dismissal of its suit then pending, and on the next day filed substantially the same suit as a new proceeding in the state court. This suit was also removed to the Federal court, where, that court holding that the dismissal of the City's petition in the first suit had not effected dismissal of defendant's counterclaim, the City obtained a reinstatement of its first suit, and an order consolidating the two suits for trial. More than a year having elapsed since the filing of the suit, the issues as to Sec. VIII(a) having become moot, and the parties having copiously and frequently amended, the City, on December 30, 1936, filed a supplemental bill in which the events in Arkansas were set out, and the prayer was that Sec. IX be enforced, and under it defendant ordered—

"(1) to place in immediate effect in Texarkana, Texas, certain Arkansas rates.

(2-3) to pay reparations, based on the Arkansas rates from June 13, 1930 to date of decree divided into three periods of time;

[fol. 429] (a) June 13, 1930 to February 16, 1934;
(b) February 16, 1934 to December 4, 1936;
(c) December 4, 1936, to date of decree;

(4) that for (a) and (c) periods the reparations be distributed to the gas consumers in Texarkana, Texas,

(5) that reparations for (b) period be held in court, conditioned on the outcome of the appeal in the Arkansas rate case."

On July 14, 1937, defendant filed a separate amended answer and counterclaim, carrying forward all of its defenses, and particularly that Secs. VIII (a) and IX were void, and that if effective, Sec. IX did not entitle plaintiff to any of the relief it prayed. Thereafter, the City's motion to strike appellant's answer and counter claim was sustained, and a decree was entered, finding and adjudging. (1) that Section IX was a valid and binding contract, and that it obligated appellant to place in effect in the Texas city, after, but not before it had been finally compelled to, or should

voluntarily, place them in effect in Texarkana, Arkansas, any rates effective in that city which were less than those provided for the Texas city by the 1930 ordinance; (2) that so construed, Section IX was applicable to the period from collected from its consumers in Texarkana, Arkansas, the December 1, 1933, to February 16, 1934, when defendant 1923 rate, and required refunds to the Texas consumers for that period on the basis of the Arkansas rate; (3) that so construed, it was not applicable to the period from June 16, 1930 to December 1, 1933, during which defendant had collected from its Arkansas consumers the equivalent of the rates collected from the Texas consumers, and the Texas consumers were not entitled to refunds for that period; (4) that so construed, since litigation has been since February 16, 1934, and still is, pending over the Arkansas rates, [fol. 430] and defendant has not, for that period, voluntarily put in, nor been finally compelled to put in, rates less than those prescribed under the 1930 ordinance for the Texas City, plaintiff's suit is premature, and shall be dismissed without prejudice, insofar as it seeks refunds for the past, and a new rate for the future on the claim that the 1923 rate has been put into effect in Arkansas, either voluntarily, or under final compulsion.

Appellant has appealed as to findings (1) and (2); appellee has cross-appealed as to findings (3), (4) and (5).

As the case stands before us then, only two broad questions are presented: (1) the validity and enforcibility of Sec. IX; (2) its meaning, application and effect, if valid and enforcible. Appellant insists that the clause is completely invalid, because an attempt on the part of the City to surrender its non-delegable ratemaking function to appellant, and the constituted authorities in Arkansas. It argues that by its charter the Texas city is authorized and obligated to exercise its governmental function of rate regulation, and that it may not, under its general powers to contract for rates, bind itself or appellant to operate under rates which may from time to time be fixed by and in Arkansas. It insists that the ratemaking function of cities in Texas embraces and includes the power to raise, as well as to reduce rates, in the interest of and in accordance with the public need. City of Seymour, vs. Texas Electric Service Co., 66 Fed. (2d) 814. Texas & Louisiana Power Co. vs. City of Farmersville, 67 S. W. (2d) 235. It urges that "this class of functions the City must perform. The City

has no option. They are not to be exercised or ignored by the municipality at discretion. * * * Such functions are legal duties imposed by the state upon its creature." City of Uvalde vs. Uvalde Electric & Ice Co., 250 S. W. 141; Texas Gas Utilities vs. City of Uvalde, 77 S. W. (2d) 750. [fol. 431] It insists that this clause, which declares that "grantee shall not be authorized or permitted to charge or collect any higher rate than the lessened rate prevailing in Arkansas," and if valid, obligates the appellant and the City to maintain a particular rate, merely because it has been instituted in Arkansas, is contrary to the public policy of Texas, and void. It urges therefore, that the decree is fundamentally erroneous in adjudging the clause valid, instead of invalid, in retaining the bill to grant partial relief, instead of dismissing it altogether. In the alternative, it argues that if wrong in this, and the clause is valid and enforcible at all, it is so only prospectively to compel the fixing of rates for the future in Texas, after they have been finally fixed either compulsorily, or by agreement in Arkansas, and not retrospectively, by way of refund, for the periods when in Arkansas the rates were in dispute. It insists, therefore, that the District Judge was right in holding the clause inapplicable, and denying relief as to the 1930-34 period of controversy in Arkansas, wrong in holding it applicable and granting relief as to the December 1933-February 34 period, when, though the first litigation had ended, appellant had in October, '33 applied for and the controversy was pending, over still higher rates: that he was right in part, and wrong in part, as to the last period, from 1934 to date, right in dismissing the bill, wrong in dismissing it without prejudice. In short, appellant is here urging that the bill should have been dismissed with prejudice, both because the contract it sought to enforce is not a valid one, and because if valid, it does not apply, except prospectively, to require the Arkansas rates to be put in in Texas, after, and not before, they have been made finally effective voluntarily or by compulsion.

As to that part of the decree which sustaining the contract as valid, and awarding it reparation, was in its favor, the City insists that the clause it seeks to enforce in no manner invades or impairs its ratemaking function, in [fol. 432] no manner abdicates or delegates its governmental power to regulate the rates to be charged with in its confines.

It argues that the clause does no more than to obligate appellee, in consideration of its franchise, to serve the Texas city under rates no greater than those which from time to time, the company agrees, or the law declares, are reasonable and fair for its neighbor city in Arkansas. That in short, the clause merely operates to bind appellant not to discriminate against the Texas city by rendering substantially the same service in Arkansas, for less than it charges for it in Texas.

Agreeing with appellant that the clause would be without binding force if appellant was urging it against the City's right to regulate the rates, either upward or downward, in the exercise of its governmental power, the City argues that that principle is not applicable here, for here is no question of preventing the City from regulating appellant's rates. The question is merely whether the City may enjoy the fruits of a contract which appellant voluntarily, and for a consideration, made with it. Urging that the contract is binding upon appellant to be enforced as written, at least, until appellant shows that the application of the Arkansas city rates in the Texas city will in fact operate against the public interest, the City maintains that the limitations, if any, imposed by its ratemaking, upon its contractual, powers come into play and have effect only in situations where detriment to the public from the contract actually, not theoretically, appears. It insists; that here it is not shown that the rates are confiscatory, or otherwise against the public interest; that indeed, throughout the litigation in Arkansas the rates insisted on have been sustained; that the claim is merely that since the power to regulate cannot be contracted away, and a city cannot bind itself by contract to any fixed rate, the Utility cannot be bound to one. Citing cases which it claims hold that a Utility may be held to a [fol. 433] rate fixed in its contract, Cleburne Water Co. vs. City of Cleburne, 35 S. W. 733; Texarkana Gas, etc. Co. vs. City of Texarkana, 123 S. W. 213; Fort Smith Light Co. vs. Fort Smith, 202 Fed. 581; Dallas Ry. vs. Geller, 271 S. W. 1106; Southern Utilities Co. vs. City of Palatka, 268 U. S. 232; City of Terrell vs. Terrell Elec. Co., 187 S. W. 966; Pocohontas vs. Central Power & Light Co., 244 S. W. 712; Texas Telephone Co. vs. City of Mart, 226 S. W. 497, the City insists that that principle applies here to bind the Utility to decrease its rates, as it decreases them in Arkan-

sas. But see City of San Antonio vs. San Antonio, 255 U. S. 547; R. R. Comm. of Calif. vs. Los Angeles Ry., 280 U. S. 145; Uvalde vs. Uvalde, supra.

Upon those parts of the decree which were adverse to it, the City argues vigorously that the principal apparent purpose of the parties was to keep the Texas and Arkansas rates on a parity, so that at all times the citizens of each city should pay substantially the same for the same service; that the contract should therefore be construed as applicable not merely prospectively, but retrospectively. As to the 1930-33 period, it urges that it should have had the refund just as prayed, and as to the period '34 to date, that the cause should not have been dismissed, but should have been retained until the Arkansas litigation had ended, for a decree then to be entered requiring the institution of the finally established rates for the future, and refunds for the past.

We think appellant has the right of it throughout, and that the decree should be reversed, both because the clause is completely invalid, and because, if valid and enforcible, it is without application here. But the clause is not valid. It is completely invalid and unenforcible as an attempt to abdicate and delegate the City's ratemaking function, and the decree should be reversed because it is. Whatever might be [fol. 434] said for the City's side of the case, if, as it assumes, the contract were in effect one in which the Utility had agreed, in consideration of the franchise, to maintain a fixed rate, we think it perfectly plain that the clause in question is not such a contract. Its effect is to abdicate, at least qualifiedly, the City's ratemaking function for the future, and to delegate it in the same qualified way, to the Utilty and the Arkansas city.

Under it, if the Utility decides to lower its rate in Arkansas by so much as a fraction, the rates then fixed by it become the rates which may be charged in the Texas city. If the Arkansas city finally lowers its rates, ever so little or so much, those rates become the rates in Texas, no matter if those rates are deemed by the Texas city to be grossly unjust or inadequate. For this clause, unlike the clauses in the cases on which the City relies, is not one merely agreeing upon a rate which the Utility may charge. It is one purporting to bind the City and the Utility alike to abide by the future action of the Utility and the City of Arkansas, if less rates are put in there voluntarily or under final compulsion.

The clause does not provide that the grantee shall be compelled, if required by the Texas city Council, to put in the lessened Arkansas rates. It provides peremptorily and without qualification, that if the lessened rates are placed in *in* Arkansas, "then and thereupon the lessened rates shall apply in the city of Texarkana, Texas, and grantee shall not be authorized or permitted to charge and collect any higher rate." A more definite binding of the hands of the City Council, a more complete abdication of its ratemaking function, a more complete delegation of it could hardly be imagined. In the light of these provisions, the supposed lack of mutuality of which appellant makes so much, and the City discounts as inapplicable, disappears from the case, for here, by a specific provision that the lessened rates shall apply, and that grantee shall not be authorized to charge [fol. 435] and collect any higher rate, is an attempt to mutually bind appellant and the City of Texarkana to any lessened rates which may in future be fixed within the Arkansas city.

On the record before us the binding quality of this clause as it is conceived of by the City, is emphasized not alone by its suit for specific performance, by which it affirms the binding force as a contract of the clause it sues on, but by the undisputed fact that resting on the contract, it has entirely abdicated its ratemaking function, and has refused, upon the application of appellant that it do so, to exercise its rate regulating powers.

The decree is reversed and the cause is remanded with directions to dismiss the bill.

Reversed and Remanded.

[fol. 436] JUDGMENT

Extract from the Minutes of June 3rd, 1938

No. 8646

ARKANSAS LOUISIANA GAS COMPANY

versus

CITY OF TEXARKANA, TEXAS

(And Reverse Title)

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Texas, and was argued by counsel;

On consideration whereof, It is now here ordered, adjudged and decreed by this Court, that the decree of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby, remanded to the said District Court with directions to dismiss the bill;

It is further ordered, adjudged and decreed that the appellee and cross appellant, City of Texarkana, Texas, be condemned to pay the costs of this cause in this Court.

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[fol. 455] ORDER DENYING REHEARING

Extract from the Minutes of July 19th, 1938

No. 8646

ARKANSAS LOUISIANA GAS COMPANY

versus

CITY OF TEXARKANA, TEXAS

(And Reverse Title)

It is ordered by the Court that the petition for rehearing filed in this cause be, and the same is hereby, denied.

[fol. 456] MOTION AND ORDER STAYING MANDATE—Filed July 25th, 1938

UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT

No. 8646

ARKANSAS LOUISIANA GAS COMPANY, Appellant,

vs.

CITY OF TEXARKANA, TEXAS, Appellee

(And Reverse Title)

MOTION FOR STAY OF MANDATE

The City of Texarkana, Texas, states that on June 3, 1938, a decree was entered by this court whereby the decree of the District Court was reversed and the cause was remanded to the District Court for the Eastern District of Texas with directions to dismiss the bill; that the City of Texarkana, Texas, thereafter duly filed with this court its petition for rehearing, and on July 19, 1938, an order was entered by this court denying said petition.

The City of Texarkana, Texas, states that it will file with the Supreme Court of the United States a petition for a writ of certiorari to this court but that a reasonable time, not less than thirty days, and preferably not less than sixty days, will be necessary within which to prepare and

lodge such petition and supporting brief, together with the record in the case, with the Clerk of the Supreme Court.

The City shows the court that it filed in connection with the appeal its bond in the sum of One Thousand and No/100 ($1,000.00) Dollars conditioned that it should pay to the Arkansas Louisiana Gas Company the costs adjudged in its favor if said City should fail to sustain its appeal, that the amount of said bond is more than ample to cover any costs [fol. 457] to which said gas company may be entitled, and that the stay herein applied for affects only such judgment for costs as may be entered in favor of the gas company. The City accordingly believes that it is unnecessary for this court, in granting the stay of its mandate, to condition the same upon the giving of any further security; but in case the court should consider further security necessary the City of Texarkana, Texas, stands willing to furnish the same.

The City of Texarkana, Texas, therefore prays that an order be entered staying the issue of the mandate of this court for such time as is reasonably necessary to permit the City of Texarkana, Texas, to file with the Clerk of the Supreme Court its petition for certiorari herein with supporting brief and record.

Ed B. Levee, Jr., B. E. Carter, Solicitors for the City of Texarkana, Texas.

[fol. 458] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH DISTRICT

No. 8646

ARKANSAS LOUISIANA GAS COMPANY, Appellant & Cross-Appellee

versus

CITY OF TEXARKANA, TEXAS, Appellee & Cross-Appellant

On Consideration of the Application of the appellee & cross-appellant in the above numbered and entitled cause for a stay of the mandate of this court therein, to enable appellee & cross-appellant to apply for and to obtain a writ of certiorari from the Supreme Court of the United States, It Is Ordered that the issue of the mandate of this court in said cause be and the same is stayed for a period of thirty days; the stay to continue in force until the final

disposition of the case by the Supreme Court, provided that within thirty days from the date of this order there shall be filed with the clerk of this court the certificate of the clerk of the Supreme Court that certiorari petition, and record have been filed, and that due proof of service of notice thereof under Paragraph 3 of Rule 38 of the Supreme Court has been given. It is further ordered that the clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of thirty days from the date of this order, unless the above-mentioned certificate shall be filed with the clerk of this court within that time.

Done at New Orleans, La., this 25th day of July, 1938.

(Signed) Rufus E. Foster, United States Circuit Judge.

[fol. 459] CLERK'S CERTIFICATE

UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT

UNITED STATES OF AMERICA:

I, Oakley F. Dodd, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the pages numbered from 423 to 458 next preceding this certificate contain full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion of the United States Circuit Court of Appeals for the Fifth Circuit, in a certain cause in said Court, numbered 8646, wherein Arkansas Louisiana Gas Company is appellant and cross-appellee, and City of Texarkana, Texas, is appellee and cross-appellant, as full, true and complete as the originals of the same now remain in my office.

I further certify that the pages of the printed record numbered from 1 to 422 are identical with the printed record upon which said cause was heard and decided in the said Circuit Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of the said United States Circuit Court of Appeals, at my office in the City of New Orleans, Louisiana, in the Fifth Circuit, this 25th day of July, A. D. 1938.

Oakley F. Dodd, Clerk of the United States Circuit Court of Appeals, Fifth Circuit. (Seal United States Circuit Court of Appeals, Fifth Circuit.)

[fol. 460] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 10, 1938

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 42,779. U. S. Circuit Court of Appeals, Fifth Circuit. Term No. 294. City of Texarkana, Texas, petitioner, vs. Arkansas Louisiana Gas Company. Petition for writ of certiorari and exhibit thereto. Filed August 22, 1938. Term No. 294, O. T., 1938.